(1)

SHDKT PROCEEDINGS AND ORDERS DATE: [03/29/96]

CASE NBR: [22200035] ORG STATUS: [DECIDED]
SHORT TITLE: [United States]
VERSUS [Maine, et al.] DATE DOCKETED: [040169]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Apr 1 1969	P	Motion for leave to file and bill of complaint filed.
2	Jul 5 1984		The Exceptions to the Report of the Special Master are set for oral argument in due course.
3	Jul 14 1984		Motion of New York and Rhode Island for divided argument filed.
4	Aug 23 1984		The motion of New York and Rhode Island for divided argument is Granted.
5	Oct 19 1984		CIRCULATED.
6	Nov 26 1984		ARGUED.
7	Feb 19 1985		Exceptions of United States, Rhode Island and New York overruled. Recommendations of Special Master adopted and Report confirmed. Parties to submit appropriate proposed decree to Special Master for Court's consideration. Each party is to bear its own costs. Actual expenses of Special Master to be borne half by United States and

SHDKT PROCEEDINGS AND ORDERS DATE: [03/29/96]

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	DATE	NOTE	PROCEEDINGS & ORDERS
7	Feb 19 1985		Exceptions of United States, Rhode Island and New York overruled. Recommendations of Special Master adopted and Report confirmed. Parties to submit appropriate proposed decree to Special Master for Court's consideration. Each party is to bear its own costs. Actual expenses of Special Master to be borne half by United States and half by Rhode Island and New York. Court retains jurisdiction to entertain such further proceedings, etc. Opinion by Blackmun, J.
8	Apr 8 1985		Supplemental decree submitted pursuant to February 19, 1985, order.
9	Apr 10 1985		DISTRIBUTED: April 26, 1985.
10	Apr 29 1985		The Court having, by its decision of February 19, 1985, overruled all exceptions to the Report of the Special Master, adopted the Master's recommendations, and

SHDKT PROCEEDINGS AND ORDERS DATE: [03/29/96]

CASE NBR: [22200035] ORG STATUS: [DECIDED]
SHORT TITLE: [United States]
VERSUS [Maine, et al.] DATE DOCKETED: [040169]

	DATE	NOTE	PROCEEDINGS & ORDERS
10	Apr 29 1985		The Court having, by its decision of February 19, 1985, overruled all exceptions to the Report of the Special Master, adopted the Master's recommendations, and confirmed the Report, the Supplemental Decree defining

3 pp

the Rhode Island New York Boundry is entered. Actual expenses of the Special Master to be borne half by the United States and half by Rhode Island and New York jointly. The Court retains jurisdiction to entertain such further proceedings.

11	May 24 1985		Report of the Special Master.
12	May 28 1985		DISTRIBUTED: June 13, 1985. (Report of the Special Master).
13	Jun 17 1985		The Report of the Special Master on the Massachusetts boundry is recieved and ordered filed. Exceptions to the Report, with supporting briefs, may be filed by parties

	DATE	NOTE	PROCEEDINGS & ORDERS
13	Jun 17 1985		The Report of the Special Master on the Massachusetts boundry is recieved and ordered filed. Exceptions to the Report, with supporting briefs, may be filed by parties within 45 days. Replies thereto, with supporting briefs, may be filed within 30 days.
14	Aug 2 1985		Exceptions by Massachusetts filed.
15	Aug 28 1985		Order extending time for the S.G. to file a reply brief until Sept. 10, 1985.
16	Sep 10 1985		Reply brief for the United States filed.
17	Sep 11 1985		DISTRIBUTED: Sept. 30, 1985 (Exceptions to the report ofthe Special Master and Reply Brief of the United States)
18	Sep 26 1985		Motion of Massachusetts for leave to file a reply brief filed. (NP)
19	Oct 3 1985		Response to motion of Massachusetts for leave to file a

	DATE	NOTE	PROCEEDINGS & ORDERS
19	Oct 3 1985		Response to motion of Massachusetts for leave to file a reply brief filed. (NP).
20	Oct 7 1985		The Exceptions to the Report of the Special Master is set for oral argument in due course.
21	Oct 7 1985		DISTRIBUTED: Oct. 11, 1985. (Motion of Mass. for leave to file reply brief.
22	Oct 15 1985		The motion of Massachusetts for leave to file a reply brief is granted.
23	Oct 23 1985		CIRCULATED.
24	Oct 28 1985		Reply brief of the Commonwealth of Massachusetts filed.
25	Dec 12 1985		ARGUED.
26	Feb 25 1986		Exceptions of Massachusetts to the portion of the Special Master's report overruled. The parties are directed to prepare and submit a decree conforming to the recommendations of the Special Master. Marshall, J.,

	DATE	NOTE	PROCEEDINGS & ORDERS
26	Feb 25 1986		Exceptions of Massachusetts to the portion of the Special Master's report overruled. The parties are directed to prepare and submit a decree conforming to the recommendations of the Special Master. Marshall, J., OUT.
27	Jul 31 1986		Massachusetts Boundary case Accounting of the Special Master received.
28	Sep 3 1986		DISTRIBUTED: Sept. 29, 1986 - Account of Special Master received.
29	Oct 6 1986		The Accounting of the Special Master for the Massachusetts Boundary case is received and ordered filed. Scalia, J. OUT.
30	Jan 31 1996		Joint motion for entry of supplemental decree (Massachusetts boundary case) filed.
31	Feb 26 1996		Joint motion for entry of a supplemental decree is

Last page of docket

	DATE	NOTE	PROCEEDINGS & ORDERS
31	Feb 26 1996		Joint motion for entry of a supplemental decree is granted. [See file for supplemental decree]

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 35, Original

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF MAINE, et al.
(MASSACHUSETTS BOUNDARY CASE),

Defendants.

REPORT OF THE SPECIAL MASTER

WALTER E. HOFFMAN
Special Master
425 U.S. Courthouse
Norfolk, Virginia 23510

89 pp
folded

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. CONVENTION ON THE TERRITORIAL SEA AND CONTIGUOUS ZONE 4

A. Delimitation of Baselines Under the Convention 5

1. Normal Baselines 5

2. Straight Baselines 6

3. Baselines of Bays 6

B. Effect of Classifying Waters as Internal, Territorial, or High Seas 7

III. POSITION OF THE PARTIES 9

IV. HISTORIC WATERS ANALYSIS 10

A. Disclaimer of Historic Title by the United States 13

1. Effectiveness of the Disclaimer 13

2. Burden of Proof 21

B. Validity of the Distinction between Ancient and Historic Title 24

C. Evidence Supporting the Massachusetts Claim 27

1. Massachusetts as the Successor in Interest to the British Crown 27

a. The Royal Charters 38

b. The *Inter Fauces Terrae* Doctrine 43

2. The History and Historical Geography of the Sounds 51

3. The 1881 Legislation and Vineyard Sound ... 58

D. Evaluation of the Massachusetts Claim 61

1. Vineyard Sound 61

2. Nantucket Sound 64

V. INTERNATIONAL STRAITS ANALYSIS 66

A. The International Law of Straits 66

B. Vineyard Sound and Nantucket Sound as International Straits 67

VI. CONCLUSION 68

VII. RECOMMENDATIONS 68

TABLE OF AUTHORITIES

CASES

Pages

Anglo-Norwegian Fisheries Case, [1951] I.C.J. Reports 116 6,26,56,57,62

Commonwealth v. Manchester, 152 Mass. 230 (1890) 59,60

Commonwealth v. Peters, 53 Mass 230 (1890) 46,65

Corfu Channel Case (United Kingdom v. Albania), [1949] I.C.J. Reports 3 66,67

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The King v. Bruce, [1812] 2 Leach 1094, 168 E.R. 643 45

Leigh v. Burley, [1608] Owen 122, 74 E.R. 946 44

Mahler v. Norwich and New York Transportation Co., 35 N.Y. 352 (1866) 37,39,40,42

Manchester v. Massachusetts, 139 U.S. 240 (1891) 59,60

Martin v. Waddell, 41 U.S. 367 (1842) 39,40,41,42,43

The Queen v. Cunningham, [1859] Bell's Cr. Cas. 72 33,34,45

The Queen v. Keyn, [1876-77] L.R. 2 Exch. Div. 63 28,32,33

United States v. Alaska, 422 U.S. 184 (1975) ... 10,11,25,61,63

United States v. Bevans, 16 U.S. 336 (1816) 37

United States v. California, 381 U.S. 139 (1965)..... 3,5,6,12,13,21,26,66

United States v. California, 382 U.S. 448 (1966)..... 3

United States v. Florida, 420 U.S. 531 (1975)..... 24

United States v. Grush, 26 U. C. Cas. 48 (C.C. D.Mass 1829) (No. 15,268)..... 37,45,48,49

United States v. Louisiana, 394 U.S. 11 (1969)..... 3,5,6,9,11,12,13, 17,21,24,26,27,43,61

United States v. Louisiana, 420 U.S. 529 (1975)..... 24

United States v. Maine, et al, 420 U.S. 515 (1975)..... 1,2,30

SPECIAL MASTER REPORTS

Special Master Report, *United States v. Florida*, No. 52 Original, January 18, 1974..... 23,24

Special Master Report, *United States v. Louisiana*, No. 9 Original, July 31, 1974..... 23,24

Special Master Report, *United States v. Maine, et al.* No. 35 Original, January 13, 1974..... 28,29,30,32,40,41,46

Special Master Report, *United States v. Maine, et al. (Rhode Island, New York)*, No. 35 Original, 1984..... 2,22,38

OPINIONS OF THE ATTORNEY GENERAL

Seizure in Neutral Waters (The Grange), 1 Op. Att'y. Gen. 32 (1793)..... 35,36,62,63

STATUTES AND TREATIES

Act of August 4, 1790, 1st Cong., Sess II, ch. 35, 1 Stat. 145..... 36,62

Act of March 2, 1799, 5th Cong., Sess III, ch. 22, 1 Stat. 627..... 36,62

Act of July 31, 1789, 1st. Cong., Sess. I, ch. 5, 1 Stat. 29..... 36,62

Convention on the Territorial Sea and Contiguous Zone, April 29, 1958, 15 U.S.T. 1607, T.I.A.S. 5639..... 1,4,5,6,26,66 *and passim*

Article 1..... 7,8

Article 2..... 8

Article 3..... 5,6,9

Article 4..... 6,12,29

Article 5..... 6,67

Article 7..... 6,7,9,10,26,68

Article 10..... 5,6,9

Article 11..... 5,6

Article 13..... 5

Article 14..... 8,11

Article 16..... 66,67

Article 19..... 8

Article 20..... 8

Article 24 8,9

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Neutrality Act of 1974, 3d Cong., Sess. I, ch. 50, 1 Stat. 381 34

Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315 3

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D.P. O'Connell, *The International Law of the Sea,* 2 v. (1982, 1984) 37,42,44,52,67

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APPENDICES

APPENDIX A — Supplemental Decree of Supreme Court of the United States, 452 U.S. 429 (1981).

APPENDIX B — Stipulation in Lieu of Amended Pleadings, Filed, May 3, 1982.

APPENDIX C — Chart 13237, Nantucket Sound and Approaches, showing the closing lines agreed to in the Stipulation in Lieu of Amended Pleadings [Appendix B] in the event the Nantucket Sound is adjudged not to be inland waters.

APPENDIX D — Chart 13200, Georges Banks and Nantucket Shoals, showing the closing lines under the Massachusetts claim.

APPENDIX E — Railway and Township Map of Massachusetts, 1871, showing the official county boundaries in the area of Nantucket Sound, Vineyard Sound and Buzzards Bay. [Mass. Ex. 120].

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 35, Original

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF MAINE, et al.
(MASSACHUSETTS BOUNDARY CASE),

Defendants.

REPORT OF THE SPECIAL MASTER

I. INTRODUCTION

The issue to be decided in this Supreme Court original jurisdiction proceeding is the location of the legal coastline of the United States in the area of Vineyard Sound and Nantucket Sound. The resolution of this issue turns specifically on whether Vineyard Sound and Nantucket Sound are bays under the terms of the Convention on the Territorial Sea and Contiguous Zone.

In January 1977, the United States and the Commonwealth of Massachusetts filed a Joint Motion for Supplemental Proceedings and for Appointment of a Special Master in the case, *United States v. Maine, et al.*, No. 35 Original, to determine the coastline of the Commonwealth of Massachusetts. On

June 29, 1977, the Supreme Court appointed the undersigned to serve as Special Master in this proceeding. 433 U.S. 917 (1977).[1]

After the parties submitted pre-trial memoranda setting forth their contentions, hearings took place on October 21, 1982 in Norfolk, Virginia, on November 8 to 10, 1982 in Boston, Massachusetts, on June 5, 1983 in Norfolk, and on July 26 and 27, 1983, also in Norfolk. Following these evidentiary hearings, the parties submitted simultaneous post-trial briefs and post-trial reply briefs. Oral argument took place on June 1, 1984 in Boston, following which Massachusetts submitted a short post-argument memorandum on an issue which the United States raised for the first time in its post-trial reply brief.

The original dispute in this proceeding included the areas of Buzzards Bay and Massachusetts Bay, as well as Vineyard Sound and Nantucket Sound. In 1981, the parties agreed to a partial settlement under which the United States accepted the Massachusetts position in Buzzards Bay and Massachusetts agreed to the United States position in Massachusetts Bay. The Supreme Court entered a supplemental decree to this effect. 452 U.S. 429 (1981)[2] [Appendix A to this Report].

The sole remaining issue in this proceeding is the proper location of the legal coastline of the United States and the Commonwealth of Massachusetts in the area of Vineyard Sound and Nantucket Sound. The legal coastline, also called the baseline, marks the seaward limit of a state's internal

[1] In December, 1976, the United States moved for supplemental proceedings in *United States v. Maine, et al.*, to determine the coastline of Massachusetts and Rhode Island. The June 29, 1977 order of the Supreme Court referred both disputes to the undersigned. When it became clear that the two disputes involved different issues, the undersigned separated the Rhode Island proceedings from the Massachusetts proceedings. *See* Report of the Special Master, *United States v. Maine, et al. (Rhode Island, New York)*, No. 35 Original at 1-3 (1984).

[2] *See* Appendix A to this report.

waters and separates those waters from the state's territorial sea. Under the Submerged Lands Act, 43 U.S.C. §§ 1301-1315, coastal states have jurisdiction over a three-mile[3] belt of territorial sea seaward of the baseline. *See United States v. Louisiana*, 394 U.S. 11, 22-23 (1969); *United States v. California*, 381 U.S. 139 (1965); *see also United States v. California*, 382 U.S. 448, 450 (1966).

Massachusetts asserts that Vineyard Sound and Nantucket Sound comprise bays and are therefore internal waters of the Commonwealth, closed off by a series of lines beginning at Cuttyhunk Island (the most seaward of the Elizabeth Islands and one terminus for the line closing Buzzards Bay) and ending at Monomoy Point (the southern tip of Monomoy Island, which marks the southern tip of Cape Cod).[4] The United States denies that the sounds are internal state waters. Instead, the United States contends, the waters of Vineyard

[3] To minimize confusion, when this report refers to "miles," it means *nautical* (sea) miles, unless it clearly states the contrary. The length of the internationally recognized nautical mile is 1,852 meters (2,025.73 yards). The other internationally recognized measurement of distance is the geographic mile of 1,855 meters (2,029.03 yards). Both the nautical and geographic miles are appreciably longer than the statute (English or land) mile of 1,609.35 meters (1,760 yards). The other frequently used maritime measurement is the marine league of three nautical miles.

[4] Massachusetts asserts in its Memorandum (Amended Answer) that the relevant coastline for Massachusetts is represented

> (b) with respect to Nantucket Sound, by closing lines drawn from the southern point of Nauset Beach in Chatham to the northeastern point of Monomoy Island; from the southern point of Monomoy Island (Monomoy Point) to the northern point of Nantucket Island (Great Point); from the southwestern point of Nantucket Island to the southeastern point of Esther Island; from the northwestern point of Esther Island to the southern point of Tuckernuck Island; from the northwestern point of Tuckernuck Island to the southeastern point of Muskeget Island (excluding the barrier spit in the southern area of Muskeget Island); from the northwestern point of Muskeget Island to Muskeget Rock; and from Muskeget Rock to the southeastern point of Martha's Vineyard (Wasque Point);
>
> (c) with respect to Vineyard Sound, by a closing line drawn from the western point of Martha's Vineyard to the southeastern point of Cuttyhunk Island;

Sound are territorial waters, while those of Nantucket Sound are territorial waters in part and high seas in part. According to the United States, the legal coastline in this area is the ordinary low water mark along the mainland from Cuttyhunk Island to Monomoy Point as well as around the various islands south of the two sounds.[5]

If Massachusetts is correct in asserting that Vineyard Sound and Nantucket Sound are bays, they would be internal state waters and the legal coastline would be that put forward by the Commonwealth. If, on the other hand, the sounds are not bays, their waters would be territorial waters and high seas, and the legal coastline would be that put forward by the United States.[6] The resolution of this proceeding therefore turns on whether Vineyard Sound and Nantucket Sound qualify as bays under the guidelines set forth by the Supreme Court.

II. CONVENTION ON THE TERRITORIAL SEA AND CONTIGUOUS ZONE

The Supreme Court has directed, and the parties to this proceeding agree, that the courts will use the Convention on the Territorial Sea and Contiguous Zone, April 29, 1958, 15 U.S.T. 1607, T.I.A.S. 5639 [hereinafter the Convention], to define inland or internal waters. *United States v. Louisiana*, 394 U.S. 11, 17-35 (1969); *United States v. California*, 381 U.S. 139, 161-67 (1965). The Supreme Court has concluded that the Convention provides "the best and most workable definitions available" for defining the extent of inland waters, including bays. *United States v. Louisiana*, 394 U.S. at 21; *United States v. California*, 381 U.S. at 163-65. These decisions also indicate that the Convention is the only valid mechanism for defining inland waters and the legal coastline to insure that the United States will have a single coastline for both domestic purposes and international relations. *United States v. Louisiana*, 394 U.S. at 34-35; *United States v. California*, 381 U.S. at 165. The Special Master will therefore apply the Convention to resolve the issues raised in this proceeding.

A. DELIMITATION OF BASELINES UNDER THE CONVENTION

1. The Normal Baseline

The Convention establishes straightforward rules for locating the normal baseline, or legal coastline. Article 3 defines the normal baseline as "the low-water line along the coast as marked on large-scale charts officially recognized by the coastal states." In case of rivers flowing directly into the sea, Article 13 allows the baseline to be a straight line drawn "across the mouth of the river between points on the lowtide of its banks."

Article 10(1) defines an island as "a naturally formed area of land, surrounded by water, which is above water at high-tide." Article 10(2) provides that islands have baselines measured in accordance with the same provisions as a mainland.

Article 11 provides that, under certain circumstances, a "low-tide elevation" may have a territorial sea of its own, to be aggregated to that of nearby bodies of land. A low-tide elevation is "a naturally formed area of land which is surrounded by and above water at low-tide but submerged at high-tide." If such an elevation is located "wholly or partly

[5] The United States submits in its amended complaint that the Massachusetts coastline is "the low water line along the mainland and along the numerous offshore islands which form Nantucket Sound."

[6] The parties to this proceeding have agreed to a Stipulation in Lieu of Amended Pleadings [Appendix B to this Report]. This Stipulation sets forth an agreement as to the legal coastline of Massachusetts under the following circumstances: (1) if both sounds are determined to be inland waters; (2) if Nantucket Sound is determined not to be internal waters, regardless of the ultimate status of Vineyard Sound; and (3) if Vineyard Sound is determined not to be internal waters. The only issue the stipulation does not settle is the appropriate closing line for the northeastern entrance of Vineyard Sound if it is determined to be internal waters, but Nantucket Sound is not.

at a distance not exceeding the breadth of the territorial sea from the mainland or an island", the state may use the elevations's low-water line as the baseline to measure the territorial sea.

Article 5(1) provides that "[w]aters on the landward side of the baseline of the territorial sea form part of the internal waters of the state."

Other Articles of the Convention provide guidelines for determining the baseline of atypical geographic formations.

2. Straight Baselines

The Convention recognizes that the system of normal baselines set out in Articles 3, 10 and 11 may be inappropriate to States whose coastline is deeply indented or has an island fringe in its immediate vicinity. Such States may choose to adopt the "straight baselines" of Article 4 rather than the normal baselines of Article 3. Article 4 codifies the decision in which the International Court of Justice held that the Norwegian system of straight baselines did not violate international law. *See North Sea Fisheries Case (United Kingdom v. Norway)*, [1951] I.C.J. 116.

Even though the straight baseline system might be appropriate to some parts of the coasts of the United States, the Federal Government has not elected to apply the system to delineate the baseline of the United States. Moreover, the Supreme Court has held that the decision to use Article 4 "rests with the Federal Government, not with the individual States." *United States v. California*, 381 U.S. at 168; *United States v. Louisiana*, 394 U.S. at 72. Accordingly, the straight baseline system of Article 4 is inapplicable to this proceeding.

3. Baselines of Bays

Article 7 sets forth special rules for drawing the baselines of "bays." Article 7(1) limits the Article's scope to "bays the coasts of which belong to a single state." Articles 7(2) and 7(5) set forth criteria for defining "juridical bays" and for

drawing proper closing lines (baselines) for such bays.

Article 7(2) defines a bay as a "well-marked indentation whose penetration [into the land] is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast." To qualify as a juridical bay, the indentation must meet the "semi-circle" test, *i.e.*, its area must be at least as large as the semi-circle whose diameter is a line drawn across the bay's mouth. Article 7(3) deals with the operation of the semi-circle test if islands exist which cause the indentation to have more than one mouth.

If an indentation qualifies as a bay under Articles 7(1) through (3), Articles 7(4) and (5) allow it to have a closing line of up to twenty-four nautical miles, with the waters landward of that line to be considered as internal waters. If the "natural entrance points" of the bay are less than twenty-four miles apart at low tide, the State may close the bay by connecting these points. Where the distance between the natural entrance points exceeds twenty-four miles, the State may draw a straight baseline of twenty-four miles inside the bay "in such a manner as to enclose the maximum area of water that is possible with a line of that length."

Finally, Article 7(6) provides a savings clause, allowing States to treat certain waters as bays even if they do not meet the criteria of the rest of the Article. Article 7(6) states that Articles 7(1) through 7(5) apply neither to "historic bays" nor to cases applying the straight baseline system. Article 7(6) thus recognizes that, even absent some or all the criteria of a juridical bay, a State may have a valid historic claim to a body of water, a claim which entitles it to treat the area as a bay and internal waters.

B. The Effects of Classifying Waters as Internal, Territorial or High Seas.

Article 1(1) of the Convention codifies the general rule of customary international law that a State's sovereignty is not

limited to its land territory and inlands waters, but extends as well to the belt of sea adjacent to its coast, *i.e.*, to its territorial sea. Article 2 defines this sovereignty as including both the air space above the territorial sea, as well as the seabed and subsoil beneath it.

Although the Convention recognizes a State's paramount interest in its territorial sea, Article 1(2) notes that sovereignty over the territorial sea is subject to the limitations of other Articles of the Convention as well as to general rules of international law.

Articles 14 through 23 set forth the most important exception to a State's sovereignty over its territorial sea: the right of innocent passage. Article 14(1) sets forth the general rule: that, subject to specific limitations and reasonable regulations, all ships enjoy the right of innocent passage through the territorial sea. The most significant limitations are those of Articles 19 and 20 which bar most exercises of a coastal State's civil and criminal jurisdiction over transient foreign flag ships. As an important exception to the right of innocent passage, Article 14(5) recognizes a coastal State's right to bar fishing in its territorial sea by foreigners and allows a coastal State to bar passage of ships which violate such a ban on fishing.

The Convention also recognizes that the territorial sea is a transitional area, one where the coastal State's sovereignty is less complete than in its internal waters, but more extensive than on the high seas. In its internal waters, a coastal state has the same plenary sovereignty that it has on land. On the high seas, on the other hand, the coastal State's jurisdiction does not approach true sovereignty.

The Convention also created a transitional zone of high seas. Article 24(1) recognizes a coastal State's right to exercise limited civil and criminal jurisdiction in a "zone of the high seas contiguous to its territorial sea." According to Article 24(2), this contiguous zone may extend up to twelve miles from the coastal State's baseline. Thus, *e.g.*, a State which

claims a three mile territorial sea may also claim an additional nine mile wide contiguous zone.

III. THE POSITION OF THE PARTIES

The issue in this proceeding is the proper location of the closing line in the area of Vineyard Sound and Nantucket Sound. Both parties agree that the provisions of Articles 7(1) through 7(5) relating to juridical bays are inapplicable to Vineyard Sound and Nantucket Sound. Their position is in accord with authoritative Supreme Court precedent interpreting Article 7. The Supreme Court has held that:

> Article 7 does not encompass bays formed in part by islands which cannot realistically be considered part of the mainland. Article 7 defines bays as indentations in the "coast," a term which is used in connection with "islands" throughout the Convention.

United States v. Louisiana, 394 U.S. at 67.

Massachusetts asserts that Vineyard and Nantucket Sounds come under the savings clause of Article 7(6) and are historic inland waters of the Commonwealth. The United States denies the validity of this historic claim and relies instead on Articles 3 and 10(2) of the Convention. The United States contends that the normal base line rule of Article 3 should apply to the delimitation of the baseline of mainland from Cuttyhunk Island to Monomoy Point. Similarly, the Government argues that Article 10(2) applies to the delimitation of the baseline of Martha's Vineyard, Nantucket Island and the other islands of the area. The United States also recognizes the existence of a number of small juridical bays, both on the mainland and on the two islands, to which the baseline rules of Article 7 apply.

IV. HISTORIC WATERS ANALYSIS

Massachusetts claims that Nantucket Sound and Vineyard Sound are historic inland waters of the Commonwealth. This argument relies on the savings clause of Article 7(6) of the Convention which provides:

> The foregoing provisions shall not apply to so-called "historic" bays, or in any case where the straight baseline system provided for in Article 4 is applied.

In *United States v. Alaska*, 422 U.S. 184 (1975), the Supreme Court summarized the required elements of valid historic claim:

> The term "historic bay" is not defined in the Convention. The Court, however, has stated that in order to establish that body of water is a historic bay, a coastal nation must have "traditionally asserted and maintained dominion with the acquiescence of foreign nations." *United States v. California*, 381 U.S. at 172. Furthermore, the Court appears to have accepted the general view that at least three factors are significant in the determination of historic bay status: (1) the claiming nation must have exercised authority over the area; (2) that exercise must have been continuous; and (3) foreign states must have acquiesced in the exercise of the authority. *Louisiana Boundary Case*, 394 U.S., at 75 and 23-24, n.27.

422 U.S. at 189.

In elaborating on these factors, the Supreme Court has explained that the nature of the historic claim determines the type of evidence necessary to support that claim. With regard to the first factor, the exercise of authority must be commensurate in scope with the nature of the title claimed.

Thus, if a State claims waters as historic *inland* waters, its "exercise of authority must have been historically an assertion of power to exclude all foreign vessels and navigation."

Id. at 197. If, on the other hand, the State cannot demonstrate that it has excluded foreign shipping from the disputed waters, it may claim those waters as territorial, but not inland waters. *United States v. Louisiana*, 394 U.S. at 24 n.28, *citing* Juridical Regime of Historic Waters, 2 Y.B. Int'l. Law Comm'n. 23, U.N. Doc. A/CN.4/143 (1962) [hereinafter Juridical Regime]. Under Article 14(1) of the Convention, the critical distinction between inland and territorial waters is the littoral State's obligation to allow foreign vessels innocent passage through its territorial sea. Because of this, a claim to historic inland waters will succeed only if the claiming State can show that its assertion of sovereignty included the right to bar all foreign shipping from the waters.

Once a state has established its assertion of sovereignty over a particular body of water, it must meet the second criterion, that of time. To satisfy this, the State must show that its exercise of authority continued for a considerable time, so that it developed into a usage. *See id.* 23-24 n.27.

Finally, a State must show that foreign states have acquiesced in this long-lasting assertion of sovereignty. The Supreme Court has noted that "mere absence of opposition" is insufficient to establish international acquiescence to a claim to historic inland waters:

> [W]e feel that something more than the mere failure to object must be shown. The failure of other countries to protest is meaningless unless it is shown that the governments of those countries knew or reasonably should have known of the authority being asserted.

United States v. Alaska, 422 U.S. at 200.

In order for a State to establish a historic claim to a body of water, it must therefore meet three criteria. First, it must have exercised sovereign authority over the area with respect both to its own citizens and to foreign States and individuals. Second, it must have exercised this authority continuously

and over a long period of time. Third, foreign governments either must have known of the asserted authority and acquiesced in its exercise, or they reasonably should have known of the exercise of the authority.

The Supreme Court has adopted these criteria from general rules of international law. However, a successful State claim to historic inland waters will inevitabiy affect the stance of the Federal Government internationally. The Supreme Court has, therefore, added additional restrictions for states wishing to expand their inland and territorial waters at the expense of the high seas. First, as noted above, the decision of the Federal Government not to employ the straight baseline system of Article 4 of the Convention precludes a state from employing that system to delimit its internal waters. Second, the United States has the opportunity to disclaim that disputed areas in fact are historic inland waters.

With respect to the effect of a United States disclaimer of historic title, the Supreme Court has stated that:

> We are reluctant to hold that such a disclaimer would be decisive in all circumstances, for a case might arise in which the historic evidence was *clear beyond doubt*. But in the case before us, with its questionable evidence of dominion over the disputed waters, we think the disclaimer decisive.

United States v. California, 381 U.S. at 175 (emphasis added). The Court adopted this language in *United States v. Louisiana* and added:

> Thus, the Court indicated its unwillingness to give the United States the same complete discretion to block a claim of historic inland waters as it possesses to decline to draw straight baselines.
>
> While we do not now decide that Louisiana's evidence of historic waters is "clear beyond doubt," neither are we in a position to say that it is so "questionable" that the United States' disclaimer is conclusive. We do decide, however, that the Special Master should consider state exercises of dominion as relevant to the existence of historic title.

394 U.S. at 77.

The initial inquiry in the historic bay analysis is, therefore, to determine whether the United States has effectively disclaimed any intention on its part to establish Vineyard Sound or Nantucket Sound as historic inland waters.

In its reply brief, the United States contends that even if the United States had not disclaimed the sounds as historic inland waters, "the federal government's litigation position in this case constitutes such a disclaimer. *United States v. California*, 381 U.S. 139, 175." This assertion is wrong. The Supreme Court noted that it was "reluctant to hold that such a disclaimer would be decisive in all circumstances, for a case might arise in which the historical evidence was clear beyond doubt." *Id.* In *United States v. Louisiana*, the Supreme Court construed this passage as indicating "its unwillingness to give the United States the same discretion to block a claim of historic inland waters as it possesses to decline to draw straight baselines." 394 U.S. at 77.

If the disclaimer is effective, the next issue is what burden of proof rests on Massachusetts to produce sufficient evidence to overcome the disclaimer. The United States argues that the Massachusetts evidence must be "clear beyond doubt." Massachusetts counters that, even with an effective disclaimer, the "clear beyond doubt" is too severe and that something akin to "preponderance of the evidence" is more appropriate.

A. Disclaimer of Historic Title by the United States

1. Effectiveness of the Disclaimer

In 1971, the Committee for the Delimitation of the United States Coastline (the Coastline Committee) published a series

of charts delimiting the baseline and territorial seas of the United States. Among these charts are two which set forth the position of the United States in the litigation. *See* U.S. Ex. 91. The United States contends that these charts are sufficient, in and of themselves, to constitute a disclaimer of historic title by the United States in Vineyard Sound and Nantucket Sound. Post-trial reply brief of the United States at 60.

Massachusetts, on the other hand, makes three separate arguments to support its contention that the United States has not effectively disclaimed historic title to the two sounds. Massachusetts first argues that the charts do not constitute a meaningful disclaimer. Massachusetts further argues that, even if the Coastline Committees charts are disclaimers, they are inconsistent with other positions by the United States and therefore not effective. Finally, Massachusetts argues that the United States is estopped from disclaiming historic title in the two sounds because of its acceptance of a historical claim in its settlement of the boundary of Buzzards Bay.

Massachusetts contends that the Coastline Committee charts are incapable of disclaiming historic title because the Committee is neither authorized to pass on historic claims, nor competent to do so. The Committee's primary task is to apply the juridical principles of the Convention to the delimitation of the coastline. In a letter agreeing to the creation of the Committee, then Secretary of State William P. Rogers noted his understanding that the Committee would not "become involved in the complex legal and political considerations" connected with changes in baseline policy. Letter of May 13, 1970, U.S. Ex. 10. Dr. Robert G. Hodgson, the Geographer of the State Department and a member of the Committee, testified that he understood that Secretary Rogers intended to exclude from the Committee's purview such issues as the application of straight baselines or whether a particular body of water "would be deemed . . . to comprise historic waters." Deposition of Robert Hodgson, March 27, 1979, Tr. at 94.

Because of this restriction on the Committee's authority, the Committee chose to place a disclaimer on all its baseline

charts. Massachusetts argues that this disclaimer, and the clearly provisional character of the charts made it impossible for the charts to be an adequate disclaimer of the Massachusetts historical claim.

The United States counters that, even if Massachusetts is correct about the Committee's authority to rule on historic claims, the charts nevertheless constitute disclaimers. The United States points out that these charts mirror the official position of the United States on the location of its boundaries. Therefore, any non-recognition by the charts of a State's historic claim must constitute a disclaimer by the United States.

The Special Master concludes that the United States is correct on this point. Massachusetts errs by focusing on the correctness of the charts and on the Committee's competence to judge the validity of historic claims. Even if Massachusetts is correct in its evaluation of the competence of the Committee, the charts nevertheless act as disclaimers of unrecognized historic claims.

The charts are an assertion by the United States of its boundaries, based on the evidence available to its cartographers at a particular time. The disclaimers on the charts merely recognize that, because of the ambulatory nature of the coastline and the possibility of new evidence of valid historic claims, any baseline is of necessity provisional. The primary function of the charts is to put all interested parties, including foreign countries, on notice of the most current United States boundary claims. Therefore, the charts act as disclaimers of historic title even if the United States turns out to have been mistaken about the validity of an unrecognized historic claim.

The Special Master therefore concludes that the charts of the Coastline Committee create a presumption that the United States has disclaimed historic inland title to Nantucket and Vineyard Sounds. The burden now shifts to Massachusetts to show that the charts are ineffective disclaimers in this proceeding. In other words, has the United States acted so inconsistently with the position expressed on the charts as

to negate the disclaimer? Massachusetts argues precisely that: the United States' position in this litigation, as depicted on the charts, varies substantially with positions the United States has taken in matters unrelated to this proceeding.

Massachusetts relies primarily on the 1977 implementation of the International Regulations for Preventing Collisions at Sea, 1972 [hereinafter cited as 1972 COLREGS], October 20, 1972, 28 U.S.T. 3459, T.I.A.S. 8587. The 1972 COLREGS entered into force with respect to the United States on July 15, 1977. The COLREGS are "rules of the road" which all vessels must follow on the high seas. A country may also establish its own inland rules for some or all its inland waters.

Shortly before the 1972 COLREGS came into force, the Coast Guard published a pamphlet setting forth the new International Rules, as well as the Inland Rules and noting that the Inland Rules were to apply only to "certain inland waters of the United States." U.S. Coast Guard, *Navigation Rules: International-Inland*, CG-169 at i (May 1, 1977), Mass. Ex. 18. Soon thereafter, the Coast Guard published a supplement to this pamphlet setting forth all the relevant regulations implementing the 1972 COLREGS, including those delimiting the boundaries between the affected inland waters and the high seas. U.S. Coast Guard, *COLREGS Demarkation Lines*, CG-169-1 (July 15, 1977) (reproducing 42 F.R. 35784, July 11, 1977). Mass. Ex. 19.

These regulations became necessary because the 1972 COLREGS forbade the previous United States practice of categorizing waters subject to the Inland Rules according to administrative convenience and not necessarily according to the character of the waters as internal waters. Under the 1972 COLREGS, the United States may no longer enforce the Inland Rules in waters that are either high seas or territorial seas. *Id.* at 1. Therefore, regulations passed to implement COLREG could be valid only if they subjected only internal waters to the Inland Rules. Conversely, a characterization of waters as subject to the Inland Rules indicates a Coast Guard judgment that those waters are internal waters.

The regulations issued in 1977 which are relevant to this litigation are 33 C.F.R. §§ 82.140 and 82.145. These sections designated the entirety of Buzzards Bay, Vineyard Sound and Nantucket Sound as internal waters subject to the Inland Rules. These sections remained in force until 1979. At that time, during the discovery process of this proceeding, the Justice Department realized that these COLREGS lines treated as internal waters all the Massachusetts claims south of Cape Cod.[6a]

The Justice Department then raised the issue of these COLREGS at several Coastline Committee meetings. At one of these meetings, the Coast Guard "acknowledged that mistakes had been made" and promised that it would change the New England COLREGS lines as soon as possible. Minutes of the Coastline Committee, March 5, 1979 at 2, Mass. Ex. 30. Shortly thereafter, the Coast Guard published a revised regulation which mirrored the litigation posture of the United States in this proceeding. 44 F.R.22458, Apr. 16, 1979. The current section governing this part of the Massachusetts coastline is 33 C.F.R. § 80.145, which still treats Buzzards Bay as internal waters.

The United States argues that the Supreme Court has already considered the relevance of Coast Guard lines in *United States v. Louisiana* and has rejected their use to buttress a historic inland waters claim. *See* 394 U.S. at 17-21. This argument would be dispositive if Massachusetts were trying to relitigate the issues already settled by *United States v. Louisiana*. However, the United States' argument distorts the purpose behind the Massachusetts reliance on the 1972 COLREGS lines.

[6a] The Special Master acknowledges that the determination of the national boundaries is ordinarily a political and not a judicial function. This does not, however, preclude the courts from inquiring into the actual position taken by the sovereign in regard to specific waters, as opposed to its declared position. The *California* case held that Congress intended to leave the definition of inland waters to the courts, by interpreting the executive intent but not independently to fix its own boundaries.

In the first place, Massachusetts does not claim, as did Louisiana, that a Coast Guard line can, by itself, settle a historic claim. Louisiana simply accepted the then applicable COLREGS line as the outer limit of its internal waters. Massachusetts has not done that. It has instead used the 1972 COLREGS lines to support its argument that, because the Coastline Committee charts were inconsistent with other official government positions, they were ineffective in disclaiming a historic title to the two sounds.

Massachusetts also points out that, unlike the earlier lines on which Louisiana relied, the 1972 COLREGS lines were to be drawn in accordance with international law principles. Indeed, the regulations creating the 1972 COLREGS lines were drafted in large part by the Office of Chief Counsel of the Coast Guard. Mass. Ex. 19 at 1. Massachusetts argues that these lines, drawn under the Coast Guard's statutory authority and within the constraints of international law principles, expressed an official position of the United States so long as they were in force.

These COLREGS lines were first published in early 1977, with interested persons given until March 17, 1977 to comment. 42 C.F.R 4327 (Jan. 19, 1977). The Coast Guard had received no comment on any of the lines by the time it officially promulgated them in July. The lines were in existence for over two years between their original publication and the Coast Guard's revision of them to bring them into accord with the litigation posture of the United States in this proceeding.

Thus, for two years, the 1972 COLREGS lines designated Vineyard Sound and Nantucket Sound as internal waters of the United States. Considering the importance of these lines for international shipping, both individual foreign-flag ships and their governments must have been aware of this treatment of these waters. Nevertheless, there is no evidence that anyone, including foreign governments, complained about these lines during that two year period. The failure of any foreign government to object to the classification of the two sounds as internal waters indicates that no country aware of

the line considered it to be in violation of international law.

The final Massachusetts argument on this issue of the effectiveness of the United States disclaimer of historic title revolves around the effect of the settlement between the United States and Massachusetts in Buzzards Bay. *See* Appendix A. Massachusetts points out that, in agreeing to the line proposed by Massachusetts in Buzzards Bay, the United States accepted the Massachusetts position in part in "recognition that there was a substantial historic claim" to Buzzards Bay. Hearing of October 21, 1982, Tr. at 16 (Mr. Claiborne).

Massachusetts contends that its claim to historic title in Vineyard Sound and Nantucket Sound rests on the same kinds of historical evidence as its claim to Buzzards Bay. Because the United States recognized a valid historic claim to Buzzards Bay, Massachusetts argues, it should be estopped from disclaiming a historic title to the neighboring sounds. Massachusetts post-trial brief at 31. The United States failed to respond to this argument in either its post-trial reply brief or in the arguments before the Special Master on June 1, 1984.

The Special Master concludes that, although the United States attempted to disclaim historic title to the two sounds, this disclaimer was ineffective for the purposes of this litigation. The Special Master bases this conclusion on two factors: (1) the 1972 COLREGS lines and (2) the concession by the United States of the validity of a Massachusetts historic title to Buzzards Bay.

In concluding that the 1972 COLREGS lines vitiated the United States disclaimer, the Special Master focused on the nature of the lines and on the fact that it was the Coast Guard which drew them. Unlike the lines on which Louisiana attempted to base its claim, the lines on which Massachusetts relies were to be drawn according to principles of international law. United States' adherence to the International Regulations in 1977 mandated that inland rules of the road were to apply only in internal waters.

The Coast Guard was aware of this requirement and drew the lines in accord with its best independent interpretation of international law. Unlike the legal staff of most agencies, Coast Guard legal officers must be familiar with both international law and the limits of inland waters and the territorial sea of the United States. The Coast Guard's enforcement activities make it peculiarly concerned with having an accurate understanding of the boundaries between internal waters, the territorial sea and the high seas.

Finally, the Special Master concludes that all seagoing countries engaged in commerce with the United States knew or should have known of the 1972 COLREGS lines. The lines were published in both the Federal Register and the C.F.R shortly after the United States' accession to a Convention which mandated a change in at least some of the COLREGS lines. The importance of the new lines for accurate and lawful navigation both to and from American harbors made it necessary for all foreign-flag vessels and their governments to know the content of the regulations. Therefore, the failure of any government to remonstrate over the drawing of these lines indicates that other countries accepted the validity of designating the sounds as internal waters of the United States.

In concluding that the United States disclaimer of historic title to the two sounds was ineffective, the Special Master also partially relied on the effect of the United States acceptance of the Massachusetts claim to Buzzards Bay. From the outset of this litigation, the United States vigorously disclaimed a historic title to Buzzards Bay, Vineyard Sound and Nantucket Sound. After nearly four years of litigation, it conceded the Massachusetts claim to Buzzards Bay, but continued to disclaim title to the two sounds as vigorously as ever. The willingness of the United States ultimately to concede a historic title which it had disclaimed strenuously for almost four years makes suspect the genuineness of its disclaimer to the sounds. Moreover, its failure to rebut the argument lends support to the position advanced by Massachusetts.

2. Burden of Proof

Massachusetts argues that, even if the United States has validly disclaimed historic inland water status to the two sounds, the Commonwealth's burden of proof should be less onerous than "clear beyond doubt." The United States, on the other hand, argues that both the relevant Supreme Court decisions and the various Special Master's reports mandate the application of a "clear beyond doubt" standard of proof once the United States has disclaimed historic title.

Only two Supreme Court opinions have dealt with the issue of the effect of a disclaimer on the State's burden of proof. In *United States v. California*, the Supreme Court stated:

> We are reluctant to hold that such a disclaimer would be decisive in all circumstances, for a case might arise in which the historic evidence was clear beyond doubt. But in the case before us, with its questionable evidence of continuous and exclusive assertions of dominion over the disputed waters, we think the disclaimer decisive.

381 U.S. at 175. In *United States v. Louisiana*, the Supreme Court developed this issue somewhat and noted that:

> While we do not now decide that Louisiana's evidence is "clear beyond doubt," neither are we in a position to say that it is so "questionable" that the United States' disclaimer is conclusive.

394 U.S. at 77. The Court then referred the dispute to a Special Master for a factual determination of the baseline. *Id.* at 78.

Massachusetts focuses on the above language from *United States v. Louisiana* to buttress its argument that the Supreme Court did not intend to impose a "clear beyond doubt" standard on a State's historic inland waters claims. Massachusetts argues that, rather than stating the precise quantum of proof needed to support a historic claim in the face of a United

States disclaimer, the Supreme Court instead treated the proceeding then before it as in the nature of a motion for summary judgment. Because the Court concluded that Louisiana's evidence was neither "clear beyond doubt" nor "questionable," the Court submitted the controversy to a Special Master for the further development of evidence. Had the Court intended always to apply a "clear beyond doubt" standard to such cases, Massachusetts contends, the Court would simply have entered judgment for the United States. Post-trial Brief of Massachusetts at 34-35.

Massachusetts contends that the Supreme Court referral of the controversy to a Special Master indicates that the Court intended a lesser, but undefined, standard of proof to be applied. Thus, Massachusetts argues, a United States disclaimer should be decisive only if a State's case is so weak that no evidentiary hearings are necessary.

Finally, Massachusetts argues that applying a "clear beyond doubt" standard whenever the United States has disclaimed a historic title would be tantamount to making the disclaimer dispositive. Although the Supreme Court has never defined the "clear beyond doubt" standard, Massachusetts notes that if "the standard is equivalent to that used in criminal cases, it is unimaginable that a historic claim could be established." *Id.* at 33 n.25. In the view of Massachusetts, application of this rigorous standard flies in the face of Supreme Court precedent which limits the ability of the United States simply to preempt a state claim by disclaimer.

The United States responds to these arguments on two levels. First of all, in its view, Massachusetts misunderstood the two cases in which the Supreme Court announced the "clear beyond doubt" standard. The United States relies here primarily on the fact that at least three Special Masters, including the undersigned in the Rhode Island/New York proceeding, have interpreted the Supreme Court to have the strict standard to all cases with a United States disclaimer. Moreover, the United States argues, the burden of this standard only reflects international law which also imposes an

"extraordinary burden on those asserting historic maritime claims." Post-trial reply brief of the United States at 65.

The United States seems correct in its characterization, both of the Supreme Court opinions and the reports of those Special Masters who addressed the question of the appropriate standard. The clearest expression of which burden of proof is appropriate comes from the report of the Special Master in the Florida case. He indicated that, in order to prevail against the federal disclaimer, Florida had to establish its claim by "historic evidence which is 'clear beyond doubt.' " Report of the Special Master, *United States v. Florida*, No. 52 Original, at 42 (January 18, 1974). After examining the evidence presented to him, the Special Master concluded that the evidence offered by the State "does not meet the claim of being clear beyond doubt." *Id.* at 46.

The report of the Special Master in *United States v. Louisiana* is more equivocal, however. He characterized the issue as being whether

> the evidence supporting the [state's] claim to historic title . . . , which . . . is undisputed, is "clear beyond doubt" to the effect that such sovereignty was exercised over such waters as to establish them as historic inland waters, or whether that evidence is so "questionable" as to make the disclaimer of the United States conclusive.

Report of the Special Master, *United States v. Louisiana*, No. 9 Original at 18-19, July 31, 1974. He concluded that there was "no basis" for Louisiana's historic claim and that

> far from being clear beyond doubt, the evidence adduced here resembles that introduced in the California case which was held to be questionable, and therefore insufficient to support a finding of historic waters in the face of a contrary declaration of the United States.

Id. at 21-22.

Therefore, in all three cases, the Special Master assumed that the State had to meet the "clear beyond doubt" standard; he also concluded that the State had failed to meet even the minimal burden of proof and that the United States disclaimer was therefore conclusive. Although the Supreme Court accepted the Special Master's Reports in the Louisiana and Florida cases, its opinions made no mention of the issue of burden of proof, nor did the states themselves raise it. *See United States v. Louisiana*, 420 U.S. 529 (1975); *United States v. Florida*, 420 U.S. 531 (1975).

Based on the above, Massachusetts contends that the issue of the proper burden of proof on a state advancing a historic inland waters claim is still open. The Commonwealth therefore asks the undersigned to apply an intermediate burden of proof in this proceeding even if he concludes that the United States has disclaimed historic title to the sounds.

Were this a case of first impression, the Special Master would be inclined to agree with Massachusetts that the "clear beyond doubt" standard is an impossibly high burden to impose on a state putting forth a historic claim. However, the Supreme Court has had the opportunity to ease the states' burden when it considered the Special Masters' reports in the Florida and Louisiana cases. In both cases, the Supreme Court overruled the States' exceptions; by implication, therefore, the Court also affirmed the propriety of the "clear beyond doubt" standard.

Nevertheless, to prevent needless relitigation should the Supreme Court decide that Massachusetts is correct on the burden of proof issue, this report shall indicate its conclusions as to the validity of the Massachusetts claim under either standard.

B. Validity of the Distinction between Historic Title and Ancient Title

Massachusetts argues that its claim to the two sounds rests on two independent and alternative bases: (1) historic title and (2) ancient title. The first of these is the basis on which states have traditionally claimed historic waters before the Supreme Court. It is essentially prescriptive in nature because it involves a state's claim to possess waters which, since the rise to dominance of the doctrine of freedom of the seas, would otherwise be either territorial or high seas. A valid claim of historic title involves: (1) an exercise of sovereignty over the claimed area; (2) that exercise to be over a long and continuous period; and (3) the acquiescence of foreign states. *United States v. Alaska*, 422 U.S. at 189.

The doctrine of ancient title, on the other hand, can apply only to the acquisition of territories which international law considers *terra nullius*, land currently having no sovereign but susceptible to sovereignty. Juridical Regime at 12 (¶ 70). Applied to waters normally considered to be high seas, a claim of ancient title means that a state must affirm

> that the occupation took place before the freedom of the high seas became part of international law. In that case, the State would claim acquisition of the area by an occupation which took place long ago. Strictly speaking, the State would, however, not assert a historic title, but an ancient title based on occupation as an original mode of acquisition of territory. The difference is subtle but should in the interest of clarity be not overlooked: to base the title on occupation is to base it on a clear original title which is fortified by long usage.

Id. at ¶ 71.

Unlike a claim based on historic title, one based on ancient title is not prescriptive, i.e., it does not assert dominion over waters which belong equally to all countries. A state making an ancient title claim therefore need not prove all the elements necessary to establish historic title. Effective occupation, from a time prior to the victory of the doctrine of free-

dom of the seas, suffices to establish a valid claim to a body of water under ancient title.

The doctrine of ancient title is generally accepted under international law. The clearest expression of this acceptance is the *Anglo-Norwegian Fisheries Case*. 1951 I.C.J. 116. In that case, Norway's primary argument was that it had never accepted a status of high seas for the waters off its coast, especially the waters lying between the mainland and the fringing islands known collectively as Skjaergaard.[7] In finding for Norway, the International Court of Justice specifically recognized the Norwegian argument that its claims were valid because they were the remnant of much more extensive pre-19th century claims. *Id*. at 142.

The United States has chosen not to respond directly to the Massachusetts argument on the validity of the doctrine of ancient title. Instead, the United States has contented itself with a general denial of the applicability of the theory, relying primarily on a long quote on the invalidity of territorial claims "resting solely on extensive medieval pretensions." Y. Blum, *Historic Titles in International Law*, 250 (1965), *quoted in* Post-trial Reply Brief of the United States at 8. Yet Blum recognizes the possible validity of claims which, like those of Norway, are "remainders of more extensive ancient rights." *Id*. at 55-57.

In adjudicating boundary disputes such as the one *sub judice*, general principles of international law apply. The Supreme Court has directed that courts use the Convention on the Territorial Sea and Contiguous Zone to determine the proper coastline of the United States. *United States v. Louisiana*, 394 U.S. at 17-35; *United States v. California*, 381 U.S. at 161-67. With reference to Article 7(6) of the Convention, the Supreme Court has stated that

> [t]he only fair way to apply the Convention's recognition of historic bays to this case, then, is to treat the claim of historic waters as if it were being made by the national sovereign and opposed by another nation.

United States v. Louisiana, 394 U.S. at 77. The Special Master therefore concludes that the doctrine of ancient title is properly applicable to this proceeding as an alternative to the doctrine of historic title.

[7] The Skaergaard (literally "rock rampart") is a chain of some 120,000 islands and low tide formations which fringe the northern coast of Norway. *Id*. at 127.

C. Evidence Supporting the Massachusetts Claim

Massachusetts makes three separate arguments to support its claims to Vineyard Sound and Nantucket Sound: (1) it is the successor in interest to the perfected title of the British Crown; (2) its claim is supported by the history of the sounds, especially their role in the development of the colonial economy of Martha's Vineyard and Nantucket Island, and (3) as to Vineyard Sound alone, certain nineteenth century Massachusetts legislation acts as an assertion of sovereignty, to which foreign nations acquiesced. The first of these is a claim of ancient title, although it would also support a claim of historic title. The other two are claims of historic title.

1. Massachusetts as the Successor in Interest to the British Crown

Massachusetts argues that the British Crown treated the two sounds as inland waters during the colonial period and that Massachusetts succeeded to the Crown's title at the time of the Revolution. Massachusetts relies on two separate and independent arguments here: (1) the Crown had title to these waters by right of discovery and passed that title to Massachusetts via the Royal Charters of 1664 and 1691; and (2) even if the Charters did not pass title, the sounds were inland county waters under the *inter fauces terrae* doctrine of the English common law.

Both these theories are primarily based on the doctrine of ancient title and therefore need to show that (1) they are consistent with doctrines of English law prior to the dominance of the doctrine of freedom of the seas and (2) England continued to adhere to these theories even after freedom of the seas became dominant in customary international law.

With regard to the first of these, because of the peculiarities of 17th century English law, Massachusetts must also show that the English legal doctrines on which it relies predate the period of the Stuarts (1603-1688). *See* Report of the Special Master, *United States v. Maine, et al.*, No. 35 Original, Aug. 27, 1974, especially at 21-65. Although that report concerned the relative rights of the United States and the twelve defendant States in the seabed of the continental shelf *beyond* the three mile territorial sea, much of its analysis is relevant to this phase of the proceedings.

In his report, Judge Maris developed in some detail the development of English maritime claims in the years before the American Revolution. This detail was necessary because the States based their claims to the seabed of the continental shelf primarily on English precedent of the Stuart era. During that period, the British Crown asserted what can only be described as extravagant claims to full sovereignty over large expanses of high seas around England. *Id.* at 29-40; *see also* T. Fulton, *The Sovereignty of the Sea passim* (1911); and P. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction*, 4-11 (1927).

Prior to the coming to power of the Stuarts in 1603 and again by the 19th century, English law recognized neither property rights nor jurisdictional claims to the open seas seaward of low tide. *The Queen v. Keyn*, [1876-77] L.R. 2 Exch. Div. 63, 67. Everything seaward of county waters was high seas in which only the Admiralty Courts had a criminal jurisdiction. The Admiral's jurisdiction was limited to English ships, English subjects, or acts of piracy. Report of the Special Master, *United States v. Maine, et al.*, at 22.

Under the Stuarts, the scope of Crown claims over both property and jurisdictional rights increased dramatically. Under James I (1603-1625), England created the "King's Chambers." Fulton at 120-22. These were areas of high seas formed by closing lines which connected the various headlands on the coast to one another. A glance at a map shows that the King's Chambers were remarkably similar to the system of straight baselines allowed by Article 4 of the Convention on the Territorial Sea and Contiguous Zone.[8] The creation of the King's Chambers did not mark an extension of royal proprietary claims, however. Instead, they demarcated a zone of neutrality in which foreign ships were forbidden to fight one another. *Id.* at 122 and 547.

James I also laid claim to a proprietary interest in the rich fishing zones off the coasts of England, especially the herring fisheries in the North Sea. These areas, in which all foreigners were forbidden to fish, did not overlap significantly with the King's Chambers, especially in the North Seas fisheries. *Id.* at 122. Holland, the other major maritime power of the period, refused to accept these limits and fought three wars with England during the latter half of the 17th Century. As a result of the last of these wars, the Dutch won the right to fish these waters on an equal basis with the English. Report of the Special Master, *United States v. Maine, et al.*, at 30.

Under James I's successor, Charles I (1625-1649), the claims became, for a brief time, even more expansive. Charles I's claims included the seabed of the belt of coastal waters known as the narrow or English seas (sometimes also called the marginal sea). *Id.* at 30-33.

The 17th Century also saw a major international debate over the nature of national sovereignty over the high seas. The protagonists on the English side of this debate were John Selden and Sir Mathew Hale, while Hugo Grotius represented the Dutch. Grotius began the debate by publishing

[8] *See* Fulton at 123.

focused on the distance between the two headlands or promontories enclosing a particular body of water. If an individual standing on one headland could see across to the other, then waters landward of an imaginary closing line connecting the headlands could be treated as inland.

This theory has its origin in a somewhat obscure early fourteenth century statement concerning the jurisdiction of county coroners.

> That is no part of the sea where a man can see what is done from one part of the water and the other, so as to see from one land to the other; that the coroner shall come in such case and perform his office, as well as coming and going in an arm of the sea, there where a man can see from one part to the other of the [a word not deciphered] that is such a place the county shall have conusance.

Fitzherbert, *Corone et plees del corone* (1308), *quoted in Direct United States Cable Co. v. Anglo-American Telegraph Co. (Conception Bay Case)*, [1876-77] L.R. 2 App.Cas. 394, 417. As one scholar has pointed out, this passage contains two contradictory statements. In the first sentence, the stress is on being able both to see across the water and to determine what is happening there. In the second sentence, only the ability to see across receives emphasis. 1 O'Connell, at 341-42.

As a result of this contradiction, two separate tests developed, each named after its originator and chief spokesman. The Coke test was relatively narrow, stressing the range of visual knowledge, rather than the range of sight. Lord Coke considered as inland waters those arms of the sea "where a man standing on one side of the land may see what is done on the other." Coke, Fourth Institute, cap. 22, 140.[20] Justice

[20] Coke's formulation has always been the more controversial. A prominent scholar recently criticized Coke for not "accurately express[ing] the common law tradition" on this issue. 1 O'Connell at 342 n.11. O'Connell also argues that Coke himself rejected his test on at least one occasion, writing that "the admiral shall have no jurisdiction where a man may see from one side to another; but the coroner of the county shall enquire of felonies committed there." *Leigh v. Burley*, (1609) Owen 122, 74 E.R. 946, *quoted* in O'Connell at 342 n.11.

Story, the most prominent American exponent of Coke's doctrine, stated his understanding of the proper test of the existence of county waters in the following manner:

> I do not understand by this expression that it is necessary that the shores should be so near, that all that is done on one shore could be discerned, and testified to with certainty, by persons standing on the opposite shore; but that objects on the opposite shore might be reasonably discerned, that is might be distinctly seen with the naked eye and clearly distinguished from each other.

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> that arm or branch of the sea, which lies within the fauces terrae, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county; and therefore within the jurisdiction of the sheriff or coroner.

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[21] Unlike the court in *Bruce's Case*, most nineteenth century English courts which held that waters were *inter fauces terrae* did so without reference to either Hale or Coke. Thus one court held that the Bristol Channel was *inter fauces terrae* at a point at which is over 10 miles wide (the eastern entrance to Nantucket Sound is 9.2 miles wide according to the United States), *The Queen v. Cunningham*, [1859] Bell's Cr. Cas. 72. Similarly, the Privy Council held that Conception Bay of Newfoundland (with a width of over 20 miles at the headlands) was inland waters. *Direct United States Cable Co. v. Anglo-American Telegraph Co. (The Conception Bay Case)*, [1876-77] L.R. 2 App. Cas. 394.

> All creeks, havens, and inlets lying within projecting headlands and islands, and all bays and arms of the sea lying within and between lands not so wide but that persons and objects on the one side can be discerned by the naked eye by persons on the opposite side, are taken to be within the body of the county.

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Whether Massachusetts may claim title to the two sounds under the 1664 and 1691 charters therefore depends on the answer to two questions: (1) whether the Supreme Court should apply the Coke test or the Hale test and (2) whether either or both the sounds qualify as waters *inter fauces terrae* under the applicable test.

On the issue of which test is proper to apply in this case, Massachusetts acknowledges that those American courts which dealt with the issue have followed Justice Story's endorsement of Coke. Nevertheless, Massachusetts argues that English common law governed the colonies before 1783, and afterward until specifically rejected. Therefore, the Supreme Court should apply the more expansive Hale test. The United States, on the other hand, argues that this Court should follow the more restrictive Coke test as being the one American courts have followed since the Revolution.[22]

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Reply Brief of the United States before the Hon. Albert Maris, Special Master, at 17-18 (citations omitted) (Mass. Ex. 116).

The Special Master concludes that, because the Hale test seems to have been dominant in English case law at the time of the charters, the Supreme Court should apply that test to determine whether Nantucket Sound and Vineyard Sound were inland state waters as a result of the charters. On the other hand, to the extent that Massachusetts claims the sounds as waters *inter fauces terrae* without reliance on the charters, the Supreme Court should apply the Coke test. Regardless of what the English common law had been, the Coke test seems to have become dominant in the United States by the early nineteenth century.

Regardless of which test applies, Vineyard Sound clearly qualifies as waters *inter fauces terrae*. The sound is slightly less than six miles wide at its larger, western mouth.[23] The cliffs at Gay Head, the sound's headland on Martha's Vineyard, are approximately 150 feet high.[24] At that height, the distance of the horizon is approximately fourteen nautical miles away.[25] There is no question, therefore, that an individual standing on Gay Head Cliff could see across the sound to Cuttyhunk Island, the other headland of the western mouth of Vineyard Sound.[26] Vineyard Sound therefore easily qualifies as waters *inter fauces terrae* under the Hale test.

[23] According to Dr. DeVorsey, the distance between Gay Head and Cuttyhunk Island is 5.87 nautical miles. DeVorsey testimony, July 27, 1983, Tr. 987. The United States introduced no evidence to show that Dr. DeVorsey's measurement was wrong. Dr. DeVorsey also testified that there had been some erosion of Gay Head over the centuries, but he was unable to quantify the extent of that erosion. *Id.*

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[26] The width of Vineyard Sound's eastern mouth (between Nobska Point on the mainland and West Chop on Martha's Vineyard) is approximately 3 nautical miles, the distance of the horizon is three nautical miles at a height of 7 feet. Thus an individual five feet tall could see Nobska Point from West Chop if he were standing on an elevation of two feet above sea level. *Id.*

With respect to the Coke test, Massachusetts introduced evidence tending to show that, in the words of Justice Story

> objects on the opposite shore might be reasonably discerned, that is might be distinctly seen with the naked eye and clearly distinguishable from each other.

United States v. Grush, 26 Fed.Cas. at 52. Thus, Willis Collyer[27] testified that he could discern some objects from one shore of the sound to the other. Tr. at 470-77. He asserted that he could see buildings, specifically a windmill, on Cuttyhunk Island from a point of Gay Head. *Id.* at 477. Mr. Collyer was unclear about how small an object he could see across the sound, but doubted that he could make out an individual.[28]

Similarly, Dr. DeVorsey testified that, from Gay Head Cliff, he could see "small buildings, summer cottages I took them to be, and cars." Tr. 996. When pressed as to the visibility of smaller objects, Dr. DeVorsey doubted "an individual would be visible from Gay Head Cliff." *Id.* at 996. Although he was reluctant to state that it was impossible to make out an individual, he thought that "we are reaching the outer limits when we are talking about seeing a single individual at that distance."[29] However, Dr. DeVorsey also significantly qualified that statement by testifying that one could see appreciably farther and more clearly in colonial times than today.[30]

[27] Mr. Collyer is presently a Supervisor Natural Resource Officer for the Division of Law Enforcement of the Commonwealth of Massachusetts. He has been a Marine Law Enforcement Officer since 1955, and a seaman since 1940. Testimony of Willis Collyer, November 9, 1982, 433-40.

[28] In his testimony, Dr. DeVorsey estimated that Mr. Collyer made those observations from a point approximately one mile inland. Tr. 995.

[29] *Id.* at 997. As an example of the type of activity one might be able to distinguish, Dr. DeVorsey discussed a hypothetical revenue agent standing on Gay Head Cliff and looking across to Cuttyhunk Island. This agent could see a ship being unloaded and casks loaded onto a twenty foot wagon and deduce from that scene that rum (or some other contraband) was being smuggled in. *Id.* at 1001.

The United States presented no evidence to rebut the substance of either witness' testimony concerning the details and limits of visibility in Vineyard Sound. The Special Master therefore accepts that testimony as accurate. The Special Master considers this testimony, although somewhat equivocal, as sufficient to meet the Coke test as modified by Justice Story in *Grush*. First, and most important, is the uncontroverted evidence that visibility today is significantly less that it was in pre-industrial times. Second is the equally uncontroverted evidence that, as a result of storms, Gay Head Cliff has suffered an amount of erosion and that the western mouth of Vineyard Sound is therefore larger today than it was 300 years ago. Because of these two factors, an individual looking across the sound in 1664 or 1691 would have seen more and in greater detail than an individual of today standing in the same spot.

The Special Master therefore concludes that Massachusetts has established its claim to Vineyard Sound by ancient title regardless of whether that claim is based specifically on the royal charters or more generally on the doctrine of county waters *inter fauces terrae*.

The situation of Nantucket Sound is more complex. Its mouth is approximately 9.2 nautical miles wide today, and Massachusetts concedes that its claim to that sound cannot be established under the Coke test. Massachusetts therefore

[30] *Id.* at 1005. The validity of this conclusion becomes apparent when one compares Dr. DeVorsey's testimony concerning how far people were able to see during colonial times to Mr. Collyer's testimony concerning how far he can see today. Dr. DeVorsey testified to a number of historical sources according to which individuals on Cape Cod could see Nantucket Island across Nantucket Sound, a distance of over 20 miles. *Id.* at 1005-1007. Dr. DeVorsey also noted a number of other sources who considered twenty-five miles to be the limit to visibility at the end of the eighteenth century. *Id.* at 1007-09. Mr. Collyer, on the other hand, testified that he could not see across Nantucket Sound, even when the distances were under twenty miles. Tr. 514-16.

relies only on the Hale test to establish its title to Nantucket Sound. The United States counters that Massachusetts cannot establish its claim even under the Hale test, because Massachusetts failed to establish that someone standing on the northernmost tip of Nantucket Island could have seen across the mouth of the Sound during the colonial era.

Dr. DeVorsey testified that Monomoy Island, which lies between Nantucket Island and the southeastern tip of Cape Cod, may extend up to a "couple of miles" further south today than it did 200 years ago. Tr. at 988-989. The United States interprets this to mean that Monomoy Island may not even have existed during some parts of the colonial era.[31] The United States failed, however, to rebut Dr. DeVorsey's conclusion that Monomoy Island had existed continuously in some form and that it had probably not grown more than two miles since the early colonial period.[32]

The Special Master concludes that Monomoy Island did, as Dr. DeVorsey contends, exist during the entire colonial period, but that the exact length of the island, and the resulting width of the mouth of the channel is unclear. Nevertheless, Massachusetts introduced evidence to show that

[31] "Massachusetts Exhibits 157A-157H indicate that the distance [between Nantucket and Monomoy Islands] varied greatly, with Monomoy Island sometimes not even shown between Nantucket and the mainland of Cape Cod." Post-trial reply brief of the United States at 20. An examination of these exhibits reveals this statement to be highly misleading. Massachusetts has entered into evidence copies of ten early maps and charts. Mass. Ex. 157A-157J. Of the charts to which the United States refers, *none* fails to note some kind of land in the present day location of Monomoy Island. Even the oldest map, published some time before 1682, has what it terms "Cape Malabar" located where Monomoy Island is today. Altogether, three of the maps show Monomoy Island attached to the mainland, two make its status unclear and the others picture it as an island. Dr. DeVorsey pointed this out, testifying that "Monomoy Island had been connected to and broken with the mainland of Cape Cod more than once." Tr. at 989.

[32] "I can't think of any particular evidence that I could point to that would indicate that much additional length [up to two miles longer today], but I wouldn't dismiss it as a possibility." Tr. at 989.

people could see across the sound from Nantucket Island to the southern shore of Cape Cod, at points where the sound was wider than it was at its eastern mouth. The Special Master therefore concludes that Nantucket Sound meets the line of sight test of Lord Hale and would have been considered waters *inter fauces terrae* before the Revolution. Nevertheless, because of the ambiguity of the evidence concerning the size of the eastern entrance to the sound during the colonial period, the Special Master cannot conclude that Massachusetts has proven this part of its case under the "clear beyond doubt" standard of proof. Massachusetts can therefore establish an ancient title to Nantucket Sound only if the Supreme Court holds that the "clear beyond doubt" standard is inappropriate for this proceeding.

2. The History and Historical Geography of the Sounds

As an independent basis for its claim, Massachusetts argues that, even if title to the two sounds did not pass to it either under the royal charters or as a result of the doctrine of waters *inter fauces terrae*, Massachusetts nevertheless has title to the sounds as a result of "its history and usage of the sounds." Post-trial brief of Massachusetts at 94. Massachusetts sets forth two bases for this argument: the geological uniqueness of the lands that circumscribe the sounds, and their historical geography.

Although interesting in the abstract, the argument based on the geology of the sounds[33] seems irrelevant to the disposition of the legal issues presented in this proceeding. Massachusetts has presented no cases, nor has the Special Master discovered any, which have validated a historic claim to certain waters simply because of the geological relationship of the surrounding land masses to one another. Historical

[33] Massachusetts makes this argument in its Post-Trial Brief at 91-94.

usage, on the other hand, has long been recognized as a valid basis for a historic inland waters claim.[34]

Massachusetts argues that the two sounds and the land masses that circumscribed them formed an "amphibious resource region" during colonial times. In his testimony, Dr. DeVorsey pointed to three primary factors on which he relied to conclude that the area constituted such a region: (1) the enclosed (land-locked) character of the sounds; (2) the shallowness of the sounds, especially Nantucket Sound; and (3) the economic centrality of the sounds to the colonial population of the islands and the southern coast of Cape Cod. According to Dr. DeVorsey, these factors created a unique ecological and economic zone.

> What the people found here was a corner of the coast of rather low-lying islands and peninsulas of Cape Cod with rather low fertility as far as the agricultural potential . . . was concerned. And then they began to discover . . . the almost incredible fertility and richness of these shallow seas, these waters that were enclosed between the islands and the mainland. And they responded by developing ways of life that capitalized on the advantages here and in effect minimized the disadvantages.

Testimony of Louis DeVorsey, July 26, 1983, Tr. at 847.

In Dr. DeVorsey's view, the shallowness of the sounds reinforced their land-locked character, so that the early settlers may have perceived the sounds to be even more land-locked than they in fact were. Dr. DeVorsey traced these perceptions back through a series of historic maps and charts depicting the general area around Cape Cod. *See* Mass. Ex. 157A-157K.

[34] See 1 O'Connell, *The International Law of the Sea* at 357-358 and 417-439; Blum, *Historic Title in International Law;* Strohl, *The International Law of Bays* at 232-367; Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* at 335-442; *The Juridical Status of Historic Waters.*

The earliest of these maps is undated, but Dr. DeVorsey estimated that it had been printed no later than 1682.[35] Among relevant features of this map to which Dr. DeVorsey called attention is its labeling of Nantucket Sound as the "Zuyder Zee."[36] In his discussion of other maps, he stressed their concern with the shallowness of the sounds, and the waters around the islands, especially the maps' depictions of depth soundings, shoaling and the shifting character of the sands of the seabed. The last of these features indicates that much of the water of both sounds is shallow enough so that sailors could see the seabed and make out its features. Although the United States quibbled with some of Dr. DeVorsey's testimony, it failed seriously to challenge his characterization of the sounds as land-locked and relatively shallow.

The core of Dr. DeVorsey's testimony was his discussion of the economic development of the English settlements fringing the sounds during the colonial period. Throughout his testimony, he stressed the central importance of the sounds and their resources to the economic well-being of the colonists. Dr. DeVorsey also noted that the dependence of the early settlers on the sounds was due not only to the teeming marine life there, but also to the settlers' relative poverty. Tr. at 850-51. As a result of that poverty, the settlers lacked the

[35] Although Dr. DeVorsey testified several times that the map had been printed no later than 1682, he also testified that it was a copy of an older map. Examination of the map reveals that the model from which it was copied may have been older than 1664, the date of the English conquest of the Dutch colony of New Holland (renamed New York and granted to the Duke of York under the charter of 1664). Although the map shows English settlements in the Massachusetts Bay area, and gives English place names for the settlements around Plymouth, it shows no English settlements in Connecticut, and gives mostly Dutch names to places in Southeastern Massachusetts (e.g., Cape Cod is shown as Niew Hollant [New Holland], Cape Cod Bay as the Noort Zee [North Sea], and Nantucket Sound as the Zuyder Zee [Zuyder Sea]. The map itself indicates that it was printed in Niew Amsterdam (New York City). It is unlikely that a map done as late as the 1680s would still have all the Dutch names.

[36] The Zuyder Sea was (before the Dutch drained it) a relatively shallow, almost landlocked medium-sized bay.

capital to build large fishing ships. Lack of such ships excluded them from participating to any significant degree in the exploitation of the major North Atlantic fisheries.

The settlers of this region had to rely on relatively small boats, generally oar rather than sail powered and manned by four or five sailors. Because of the small size and relative unseaworthiness of these crafts, the fishermen of Nantucket, Martha's Vineyard and the southern shore of Cape Cod had to limit their activities to the waters immediately surrounding them.

The limited size of the fishing boats, combined with the shallowness of the sounds, forced the inhabitants of this region to develop technologies which allowed them to exploit the available marine resources more effectively. Such innovations may best be seen in Dr. DeVorsey's description of whale hunting and clamming during colonial times.

Whaling was an important industry in New England from the beginning of English settlement there. During the early colonial period, the Nantucket settlers relied primarily on drift, or beached whales. By the second half of the seventeenth century, however, Nantucket whalers had developed a technique of hunting whales which served them well. The settlers built towers along the shore, from which they had a good view of the surrounding waters. When these watchers spotted whales, large numbers of small boats (with four or five man crews) went to hunt the whales. The whalers tried either to kil! the whales in the water, or more likely, to drive them onto the shore, where the beached whales were killed. Whichever technique they used, the whalers concentrated their activities close to shore, and primarily in Nantucket Sound.

By the second half of the eighteenth century, intensive whaling inside the sounds had led to a precipitous decrease in the whale population there. This led Nantucket whalers to engage in the well-known long-distance whaling voyages, taking some of them as far afield as the Pacific Antarctic. This

classic period of Nantucket whaling was possible only because of the early century of small-boat whaling. That in turn had been possible only because of the proximity to the islands of sheltered, relatively shallow waters within easy reach of the land.

Shellfishing, especially for the hard shelled clams known locally as quahogs, was at least as important to the average colonist as was whaling. In order to harvest these clams, the settlers developed a steel-toothed rake with a handle of twenty-three feet. With such tools, the inhabitants around the sounds were able to gather large quantities of clams. Although some areas of the sounds were too deep for these rakes to be useful, Dr. DeVorsey concluded that, because of the constantly shifting sands of the seabed

> in all probability . . . at one time or another practically the whole of these areas that we now know as Nantucket and Vineyard Sounds were within the reach of that kind of technology.

Tr. at 870.

As a result of such technology, clamming was perhaps the most important industry for the local inhabitants, supplying both food for themselves and bait for other fishing. Whaling provided oil primarily for lighting purposes. Fishing for finfish also provided a major source of protein in the local diet. These three activities did not, however, mark the full extent of the settlers' dependence on the sea.

Dr. DeVorsey detailed a long list of ways in which the settlers depended on marine resources. Saltmaking was an important industry, both for domestic consumption and for export. The salt was used for seasoning foods, preserving fish and tanning leather. Because of the poor quality of the soil on the islands, the settlers depended on the sea for fertilizing their fields. The two major sources of fertilizer were non-food fish and seaweed. The settlers also used seaweed for insulation, packing it around the foundations of their

houses during the winter. The settlers made glass with the sand from their beaches, and they also exported sand which was used to polish the granite that was a popular building material in the cities. They caught seabirds for food and feathers, often using clams or fish as bait. They took advantage of the tidal flow to build tidal mills with which they milled their grain. Finally, many settlers eked out their income as "wreckers," or salvors of the wrecks which were common during the colonial period.

In its response to this volume of evidence, the United States did little more than stress that at least some whaling had taken place outside the sounds, and that the clam rakes could not have been used everywhere in the sounds at any given point in time. The United States made no attempt to rebut the rest of Dr. DeVorsey's evidence. Therefore, taking all this evidence as a whole, Massachusetts has clearly demonstrated that the sounds and the lands circumscribing them did indeed form an "amphibious resource region" as Dr. DeVorsey contends.

Nevertheless, the chief issue in this proceeding is not whether the sounds formed the basis for such a region, but whether Massachusetts has demonstrated its title to the sounds. The question now before the Special Master is therefore whether his conclusion that Massachusetts has proven the uniqueness of the political economy of colonial Martha's Vineyard and Nantucket Island has any bearing on the resolution of the wider issues in this proceeding.

The Supreme Court has not before had the opportunity to decide the extent to which historical evidence of the sort marshalled by Massachusetts can support a historic inland waters claim. This issue has arisen in international tribunals, however, and those tribunals have tended to consider favorably the kind of evidence presented in this proceeding.

Perhaps the best example of this is the *Anglo-Norwegian Fisheries Case*, [1951] I.C.J. Reports 116. Although the main focus of that case was the validity of the Norwegian system

of straight baselines, the Court also devoted a good deal of space to determining where Norway had proven a historic claim to the waters between the mainland and the fringing islands known as the Skjaergaard. The Court noted that a "fundamental consideration" in determining the validity of a historic claim

> is the more or less close relationship existing between certain sea areas and the land formations which divide and surround them. The real question raised in the choice of baselines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters . . . Finally, there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by long usage.

[1951] I.C.J. Reports at 133.

In looking at the specifics of the Norwegian historic claim to the waters between the mainland and the Skjaergaard, the Court described a situation strikingly similar to that of Nantucket and Vineyard Sounds:

> Along the coast are situated comparatively shallow banks, veritable underwater terraces, which constitute fishing grounds where fish are particularly abundant; these grounds were known to Norwegian fishermen and exploited by them from time immemorial. Since these banks lay within the range of vision, the most desirable fishing grounds were always located and identified by means of aligments [sic] ("meds") at points where two lines drawn between points selected on the coast or on islands intersected . . . In these barren regions, the inhabitants of the coastal zone derive their livelihood essentially from fishing.

focused on the distance between the two headlands or promontories enclosing a particular body of water. If an individual standing on one headland could see across to the other, then waters landward of an imaginary closing line connecting the headlands could be treated as inland.

This theory has its origin in a somewhat obscure early fourteenth century statement concerning the jurisdiction of county coroners.

> That is no part of the sea where a man can see what is done from one part of the water and the other, so as to see from one land to the other; that the coroner shall come in such case and perform his office, as well as coming and going in an arm of the sea, there where a man can see from one part to the other of the [a word not deciphered] that is such a place the county shall have conusance.

Fitzherbert, *Corone et plees del corone* (1308), *quoted in Direct United States Cable Co. v. Anglo-American Telegraph Co. (Conception Bay Case)*, [1876-77] L.R. 2 App.Cas. 394, 417. As one scholar has pointed out, this passage contains two contradictory statements. In the first sentence, the stress is on being able both to see across the water and to determine what is happening there. In the second sentence, only the ability to see across receives emphasis. 1 O'Connell, at 341-42.

As a result of this contradiction, two separate tests developed, each named after its originator and chief spokesman. The Coke test was relatively narrow, stressing the range of visual knowledge, rather than the range of sight. Lord Coke considered as inland waters those arms of the sea "where a man standing on one side of the land may see what is done on the other." Coke, Fourth Institute, cap. 22, 140.[20] Justice

[20] Coke's formulation has always been the more controversial. A prominent scholar recently criticized Coke for not "accurately express[ing] the common law tradition" on this issue. 1 O'Connell at 342 n.11. O'Connell also argues that Coke himself rejected his test on at least one occasion, writing that "the admiral shall have no jurisdiction where a man may see from one side to another; but the coroner of the county shall enquire of felonies committed there." *Leigh v. Burley*, (1609) Owen 122, 74 E.R. 946, *quoted* in O'Connell at 342 n.11.

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[25] Bowditch's *American Practical Navigator: An Epitome of Navigation*, Table 8 (Distance of the Horizon) at 1254 (U.S.G.P.O., 1958). Mass. Ex. 104.

[26] The width of Vineyard Sound's eastern mouth (between Nobska Point on the mainland and West Chop on Martha's Vineyard) is approximately 3 nautical miles, the distance of the horizon is three nautical miles at a height of 7 feet. Thus an individual five feet tall could see Nobska Point from West Chop if he were standing on an elevation of two feet above sea level. *Id.*

With respect to the Coke test, Massachusetts introduced evidence tending to show that, in the words of Justice Story

> objects on the opposite shore might be reasonably discerned, that is might be distinctly seen with the naked eye and clearly distinguishable from each other.

United States v. Grush, 26 Fed.Cas. at 52. Thus, Willis Collyer[27] testified that he could discern some objects from one shore of the sound to the other. Tr. at 470-77. He asserted that he could see buildings, specifically a windmill, on Cuttyhunk Island from a point of Gay Head. *Id.* at 477. Mr. Collyer was unclear about how small an object he could see across the sound, but doubted that he could make out an individual.[28]

Similarly, Dr. DeVorsey testified that, from Gay Head Cliff, he could see "small buildings, summer cottages I took them to be, and cars." Tr. 996. When pressed as to the visibility of smaller objects, Dr. DeVorsey doubted "an individual would be visible from Gay Head Cliff." *Id.* at 996. Although he was reluctant to state that it was impossible to make out an individual, he thought that "we are reaching the outer limits when we are talking about seeing a single individual at that distance."[29] However, Dr. DeVorsey also significantly qualified that statement by testifying that one could see appreciably farther and more clearly in colonial times than today.[30]

[27] Mr. Collyer is presently a Supervisor Natural Resource Officer for the Division of Law Enforcement of the Commonwealth of Massachusetts. He has been a Marine Law Enforcement Officer since 1955, and a seaman since 1940. Testimony of Willis Collyer, November 9, 1982, 433-40.

[28] In his testimony, Dr. DeVorsey estimated that Mr. Collyer made those observations from a point approximately one mile inland. Tr. 995.

[29] *Id.* at 997. As an example of the type of activity one might be able to distinguish, Dr. DeVorsey discussed a hypothetical revenue agent standing on Gay Head Cliff and looking across to Cuttyhunk Island. This agent could see a ship being unloaded and casks loaded onto a twenty foot wagon and deduce from that scene that rum (or some other contraband) was being smuggled in. *Id.* at 1001.

The United States presented no evidence to rebut the substance of either witness' testimony concerning the details and limits of visibility in Vineyard Sound. The Special Master therefore accepts that testimony as accurate. The Special Master considers this testimony, although somewhat equivocal, as sufficient to meet the Coke test as modified by Justice Story in *Grush*. First, and most important, is the uncontroverted evidence that visibility today is significantly less that it was in pre-industrial times. Second is the equally uncontroverted evidence that, as a result of storms, Gay Head Cliff has suffered an amount of erosion and that the western mouth of Vineyard Sound is therefore larger today than it was 300 years ago. Because of these two factors, an individual looking across the sound in 1664 or 1691 would have seen more and in greater detail than an individual of today standing in the same spot.

The Special Master therefore concludes that Massachusetts has established its claim to Vineyard Sound by ancient title regardless of whether that claim is based specifically on the royal charters or more generally on the doctrine of county waters *inter fauces terrae*.

The situation of Nantucket Sound is more complex. Its mouth is approximately 9.2 nautical miles wide today, and Massachusetts concedes that its claim to that sound cannot be established under the Coke test. Massachusetts therefore

[30] *Id.* at 1005. The validity of this conclusion becomes apparent when one compares Dr. DeVorsey's testimony concerning how far people were able to see during colonial times to Mr. Collyer's testimony concerning how far he can see today. Dr. DeVorsey testified to a number of historical sources according to which individuals on Cape Cod could see Nantucket Island across Nantucket Sound, a distance of over 20 miles. *Id.* at 1005-1007. Dr. DeVorsey also noted a number of other sources who considered twenty-five miles to be the limit to visibility at the end of the eighteenth century. *Id.* at 1007-09. Mr. Collyer, on the other hand, testified that he could not see across Nantucket Sound, even when the distances were under twenty miles. Tr. 514-16.

relies only on the Hale test to establish its title to Nantucket Sound. The United States counters that Massachusetts cannot establish its claim even under the Hale test, because Massachusetts failed to establish that someone standing on the northernmost tip of Nantucket Island could have seen across the mouth of the Sound during the colonial era.

Dr. DeVorsey testified that Monomoy Island, which lies between Nantucket Island and the southeastern tip of Cape Cod, may extend up to a "couple of miles" further south today than it did 200 years ago. Tr. at 988-989. The United States interprets this to mean that Monomoy Island may not even have existed during some parts of the colonial era.[31] The United States failed, however, to rebut Dr. DeVorsey's conclusion that Monomoy Island had existed continuously in some form and that it had probably not grown more than two miles since the early colonial period.[32]

The Special Master concludes that Monomoy Island did, as Dr. DeVorsey contends, exist during the entire colonial period, but that the exact length of the island, and the resulting width of the mouth of the channel is unclear. Nevertheless, Massachusetts introduced evidence to show that

[31] "Massachusetts Exhibits 157A-157H indicate that the distance [between Nantucket and Monomoy Islands] varied greatly, with Monomoy Island sometimes not even shown between Nantucket and the mainland of Cape Cod." Post-trial reply brief of the United States at 20. An examination of these exhibits reveals this statement to be highly misleading. Massachusetts has entered into evidence copies of ten early maps and charts. Mass. Ex. 157A-157J. Of the charts to which the United States refers, *none* fails to note some kind of land in the present day location of Monomoy Island. Even the oldest map, published some time before 1682, has what it terms "Cape Malabar" located where Monomoy Island is today. Altogether, three of the maps show Monomoy Island attached to the mainland, two make its status unclear and the others picture it as an island. Dr. DeVorsey pointed this out, testifying that "Monomoy Island had been connected to and broken with the mainland of Cape Cod more than once." Tr. at 989.

[32] "I can't think of any particular evidence that I could point to that would indicate that much additional length [up to two miles longer today], but I wouldn't dismiss it as a possibility." Tr. at 989.

people could see across the sound from Nantucket Island to the southern shore of Cape Cod, at points where the sound was wider than it was at its eastern mouth. The Special Master therefore concludes that Nantucket Sound meets the line of sight test of Lord Hale and would have been considered waters *inter fauces terrae* before the Revolution. Nevertheless, because of the ambiguity of the evidence concerning the size of the eastern entrance to the sound during the colonial period, the Special Master cannot conclude that Massachusetts has proven this part of its case under the "clear beyond doubt" standard of proof. Massachusetts can therefore establish an ancient title to Nantucket Sound only if the Supreme Court holds that the "clear beyond doubt" standard is inappropriate for this proceeding.

2. The History and Historical Geography of the Sounds

As an independent basis for its claim, Massachusetts argues that, even if title to the two sounds did not pass to it either under the royal charters or as a result of the doctrine of waters *inter fauces terrae*, Massachusetts nevertheless has title to the sounds as a result of "its history and usage of the sounds." Post-trial brief of Massachusetts at 94. Massachusetts sets forth two bases for this argument: the geological uniqueness of the lands that circumscribe the sounds, and their historical geography.

Although interesting in the abstract, the argument based on the geology of the sounds[33] seems irrelevant to the disposition of the legal issues presented in this proceeding. Massachusetts has presented no cases, nor has the Special Master discovered any, which have validated a historic claim to certain waters simply because of the geological relationship of the surrounding land masses to one another. Historical

[33] Massachusetts makes this argument in its Post-Trial Brief at 91-94.

usage, on the other hand, has long been recognized as a valid basis for a historic inland waters claim.[34]

Massachusetts argues that the two sounds and the land masses that circumscribed them formed an "amphibious resource region" during colonial times. In his testimony, Dr. DeVorsey pointed to three primary factors on which he relied to conclude that the area constituted such a region: (1) the enclosed (land-locked) character of the sounds; (2) the shallowness of the sounds, especially Nantucket Sound; and (3) the economic centrality of the sounds to the colonial population of the islands and the southern coast of Cape Cod. According to Dr. DeVorsey, these factors created a unique ecological and economic zone.

> What the people found here was a corner of the coast of rather low-lying islands and peninsulas of Cape Cod with rather low fertility as far as the agricultural potential . . . was concerned. And then they began to discover . . . the almost incredible fertility and richness of these shallow seas, these waters that were enclosed between the islands and the mainland. And they responded by developing ways of life that capitalized on the advantages here and in effect minimized the disadvantages.

Testimony of Louis DeVorsey, July 26, 1983, Tr. at 847.

In Dr. DeVorsey's view, the shallowness of the sounds reinforced their land-locked character, so that the early settlers may have perceived the sounds to be even more land-locked than they in fact were. Dr. DeVorsey traced these perceptions back through a series of historic maps and charts depicting the general area around Cape Cod. *See* Mass. Ex. 157A-157K.

[34] See 1 O'Connell, *The International Law of the Sea* at 357-358 and 417-439; Blum, *Historic Title in International Law;* Strohl, *The International Law of Bays* at 232-367; Jessup, *The Law of Territorial Waters and Maritime Jurisdiction at 335-442; The Juridical Status of Historic Waters.*

The earliest of these maps is undated, but Dr. DeVorsey estimated that it had been printed no later than 1682.[35] Among relevant features of this map to which Dr. DeVorsey called attention is its labeling of Nantucket Sound as the "Zuyder Zee."[36] In his discussion of other maps, he stressed their concern with the shallowness of the sounds, and the waters around the islands, especially the maps' depictions of depth soundings, shoaling and the shifting character of the sands of the seabed. The last of these features indicates that much of the water of both sounds is shallow enough so that sailors could see the seabed and make out its features. Although the United States quibbled with some of Dr. DeVorsey's testimony, it failed seriously to challenge his characterization of the sounds as land-locked and relatively shallow.

The core of Dr. DeVorsey's testimony was his discussion of the economic development of the English settlements fringing the sounds during the colonial period. Throughout his testimony, he stressed the central importance of the sounds and their resources to the economic well-being of the colonists. Dr. DeVorsey also noted that the dependence of the early settlers on the sounds was due not only to the teeming marine life there, but also to the settlers' relative poverty. Tr. at 850-51. As a result of that poverty, the settlers lacked the

[35] Although Dr. DeVorsey testified several times that the map had been printed no later than 1682, he also testified that it was a copy of an older map. Examination of the map reveals that the model from which it was copied may have been older than 1664, the date of the English conquest of the Dutch colony of New Holland (renamed New York and granted to the Duke of York under the charter of 1664). Although the map shows English settlements in the Massachusetts Bay area, and gives English place names for the settlements around Plymouth, it shows no English settlements in Connecticut, and gives mostly Dutch names to places in Southeastern Massachusetts (e.g., Cape Cod is shown as Niew Hollant [New Holland], Cape Cod Bay as the Noort Zee [North Sea], and Nantucket Sound as the Zuyder Zee [Zuyder Sea]. The map itself indicates that it was printed in Niew Amsterdam (New York City). It is unlikely that a map done as late as the 1680s would still have all the Dutch names.

[36] The Zuyder Sea was (before the Dutch drained it) a relatively shallow, almost landlocked medium-sized bay.

capital to build large fishing ships. Lack of such ships excluded them from participating to any significant degree in the exploitation of the major North Atlantic fisheries.

The settlers of this region had to rely on relatively small boats, generally oar rather than sail powered and manned by four or five sailors. Because of the small size and relative unseaworthiness of these crafts, the fishermen of Nantucket, Martha's Vineyard and the southern shore of Cape Cod had to limit their activities to the waters immediately surrounding them.

The limited size of the fishing boats, combined with the shallowness of the sounds, forced the inhabitants of this region to develop technologies which allowed them to exploit the available marine resources more effectively. Such innovations may best be seen in Dr. DeVorsey's description of whale hunting and clamming during colonial times.

Whaling was an important industry in New England from the beginning of English settlement there. During the early colonial period, the Nantucket settlers relied primarily on drift, or beached whales. By the second half of the seventeenth century, however, Nantucket whalers had developed a technique of hunting whales which served them well. The settlers built towers along the shore, from which they had a good view of the surrounding waters. When these watchers spotted whales, large numbers of small boats (with four or five man crews) went to hunt the whales. The whalers tried either to kill the whales in the water, or more likely, to drive them onto the shore, where the beached whales were killed. Whichever technique they used, the whalers concentrated their activities close to shore, and primarily in Nantucket Sound.

By the second half of the eighteenth century, intensive whaling inside the sounds had led to a precipitous decrease in the whale population there. This led Nantucket whalers to engage in the well-known long-distance whaling voyages, taking some of them as far afield as the Pacific Antarctic. This

classic period of Nantucket whaling was possible only because of the early century of small-boat whaling. That in turn had been possible only because of the proximity to the islands of sheltered, relatively shallow waters within easy reach of the land.

Shellfishing, especially for the hard shelled clams known locally as quahogs, was at least as important to the average colonist as was whaling. In order to harvest these clams, the settlers developed a steel-toothed rake with a handle of twenty-three feet. With such tools, the inhabitants around the sounds were able to gather large quantities of clams. Although some areas of the sounds were too deep for these rakes to be useful, Dr. DeVorsey concluded that, because of the constantly shifting sands of the seabed

> in all probability . . . at one time or another practically the whole of these areas that we now know as Nantucket and Vineyard Sounds were within the reach of that kind of technology.

Tr. at 870.

As a result of such technology, clamming was perhaps the most important industry for the local inhabitants, supplying both food for themselves and bait for other fishing. Whaling provided oil primarily for lighting purposes. Fishing for finfish also provided a major source of protein in the local diet. These three activities did not, however, mark the full extent of the settlers' dependence on the sea.

Dr. DeVorsey detailed a long list of ways in which the settlers depended on marine resources. Saltmaking was an important industry, both for domestic consumption and for export. The salt was used for seasoning foods, preserving fish and tanning leather. Because of the poor quality of the soil on the islands, the settlers depended on the sea for fertilizing their fields. The two major sources of fertilizer were non-food fish and seaweed. The settlers also used seaweed for insulation, packing it around the foundations of their

houses during the winter. The settlers made glass with the sand from their beaches, and they also exported sand which was used to polish the granite that was a popular building material in the cities. They caught seabirds for food and feathers, often using clams or fish as bait. They took advantage of the tidal flow to build tidal mills with which they milled their grain. Finally, many settlers eked out their income as "wreckers," or salvors of the wrecks which were common during the colonial period.

In its response to this volume of evidence, the United States did little more than stress that at least some whaling had taken place outside the sounds, and that the clam rakes could not have been used everywhere in the sounds at any given point in time. The United States made no attempt to rebut the rest of Dr. DeVorsey's evidence. Therefore, taking all this evidence as a whole, Massachusetts has clearly demonstrated that the sounds and the lands circumscribing them did indeed form an "amphibious resource region" as Dr. DeVorsey contends.

Nevertheless, the chief issue in this proceeding is not whether the sounds formed the basis for such a region, but whether Massachusetts has demonstrated its title to the sounds. The question now before the Special Master is therefore whether his conclusion that Massachusetts has proven the uniqueness of the political economy of colonial Martha's Vineyard and Nantucket Island has any bearing on the resolution of the wider issues in this proceeding.

The Supreme Court has not before had the opportunity to decide the extent to which historical evidence of the sort marshalled by Massachusetts can support a historic inland waters claim. This issue has arisen in international tribunals, however, and those tribunals have tended to consider favorably the kind of evidence presented in this proceeding.

Perhaps the best example of this is the *Anglo-Norwegian Fisheries Case*, [1951] I.C.J. Reports 116. Although the main focus of that case was the validity of the Norwegian system

of straight baselines, the Court also devoted a good deal of space to determining where Norway had proven a historic claim to the waters between the mainland and the fringing islands known as the Skjaergaard. The Court noted that a "fundamental consideration" in determining the validity of a historic claim

> is the more or less close relationship existing between certain sea areas and the land formations which divide and surround them. The real question raised in the choice of baselines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters . . . Finally, there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by long usage.

[1951] I.C.J. Reports at 133.

In looking at the specifics of the Norwegian historic claim to the waters between the mainland and the Skjaergaard, the Court described a situation strikingly similar to that of Nantucket and Vineyard Sounds:

> Along the coast are situated comparatively shallow banks, veritable underwater terraces, which constitute fishing grounds where fish are particularly abundant; these grounds were known to Norwegian fishermen and exploited by them from time immemorial. Since these banks lay within the range of vision, the most desirable fishing grounds were always located and identified by means of aligments [sic] ("meds") at points where two lines drawn between points selected on the coast or on islands intersected . . . In these barren regions, the inhabitants of the coastal zone derive their livelihood essentially from fishing.

Id. at 127-28.

The basis of a historic claim may therefore be established by evidence of an effective and long-term exploitation of relatively small, shallow, and at least partially land-locked bodies of water. Nantucket Sound and Vineyard Sound meet these criteria. The Special Master therefore concludes that Massachusetts has introduced sufficient evidence to support a finding that the nature and extent of the colonists' exploitation of the marine resources of the sounds was equivalent to a formal assumption of sovereignty over them.

3. The 1881 Legislation and the Massachusetts Claim to Vineyard Sound

Thus far, the Special Master has examined Massachusetts claims to both sounds based on historical rights going back to pre-revolutionary times. Alternatively, Massachusetts has also put forward a separate claim to Vineyard Sound alone, based on rights gained as a result of nineteenth century Massachusetts legislation.

During the second half of the nineteenth century, Massachusetts ceased to rely only on the common law to delimit its seaward boundaries. In 1859, the legislature set the Commonwealth's seaward boundary (the line of the Commonwealth) at one marine league (three nautical miles) from the coast. Acts of 1859, Ch. 289, Mass. Ex. 53. The Act closed off arms of the sea measuring no more than two marine leagues (six nautical miles) between headlands and made their closing lines the coastline from which the line of the Commonwealth was measured. The Act also extended county boundaries to the line. This extension of county boundaries avoided the problems created by the common law rule which limited county jurisdiction to waters *inter fauces terrae*. Under this statute, both Vineyard Sound and Buzzards Bay became inland waters of Massachusetts.

In 1881, the legislature passed another statute relevant to this proceeding. Acts of 1881, Ch. 196, Mass. Ex. 54. This statute directed the Harbor and Land Commissioners to prepare reports and charts accurately delimiting the boundaries created by the 1859 law. A number of such charts were prepared, some of which have been entered into evidence in this proceeding as Mass. Ex. 4.

Massachusetts points out that the closing line for Vineyard Sound is substantially the same as the one the state claims under the common law. Thus, Massachusetts argues, the statute acts both as a re-affirmation of all "previously ripened and vested claims" to the sound and as a *de novo* assertion of sovereignty over the sound. Post-trial reply brief of Massachusetts at 115.

Massachusetts also relies on the decision of the United States Supreme Court in *Manchester v. Massachusetts*, 139 U.S. 240 (1891). In that case, Manchester was convicted of violating a Massachusetts statute regulating fishing inside Buzzards Bay. *See, Commonwealth v. Manchester*, 152 Mass. 231 (1890). Manchester appealed his conviction to the Supreme Court, arguing that Massachusetts had unconstitutionally extended its jurisdiction into Buzzards Bay.

The Supreme Court sustained the constitutionality of the Commonwealth's jurisdiction over Buzzards Bay and affirmed Manchester's conviction. The Court based its holding on two factors. The Court concluded that Buzzards Bay had been within the territories described in the seventeenth century colonial charters, and that jurisdiction over the bay therefore passed to Massachusetts under the Treaty of Paris (September 3, 1793), which ended the Revolutionary War. 139 U.S. at 256-57. The Court also concluded that, absent federal law to the contrary, a state had the right to assert jurisdiction over its marginal sea to a distance of at least three miles from the coast, as well as over bays no more than six miles wide between headlands. *Id.* at 257. Thus, unless the Supreme Court overrules *Manchester*, Buzzards Bay forms part of the internal waters of Massachusetts.

Massachusetts contends in this proceeding that *Manchester* also implicitly ratified the Commonwealth's claim to Vineyard Sound. Massachusetts treated Vineyard Sound as internal waters under the 1881 legislation because it was an "inlet or arm of the sea" whose headlands were less than six miles apart. Massachusetts points out that, even though the status of Vineyard Sound was not before the Supreme Court in *Manchester*, one of the exhibits in that case was a map (marked Exhibit A) which showed both Buzzards Bay and Vineyard Sound as internal waters closed off by straight lines connecting their headlands. The original of this map is currently in the State Archives, but the Special Master has examined it. Massachusetts has introduced a copy of the relevant portions of the map into evidence in this proceeding. *See* Mass. Ex. 5.

Massachusetts also contends that, by the turn of the century, the major foreign powers had known of the Massachusetts claim to Vineyard Sound and, by their failure to protest, had acquiesced to it. During an earlier stage of this proceeding, Massachusetts and the United States had entered into a "Stipulation as to Facts in Lieu of Proof Before the Special Master." This document stipulates that, by the outbreak of World War I, the major European powers, all of whose foreign ministries had legal departments charged with "monitoring and analyzing" legal developments, had "de facto" knowledge of *Manchester* and of its contents. As Massachusetts points out, this knowledge included the text of the 1881 Massachusetts statute, the fact that the Supreme Court had upheld the Massachusetts statute as valid under both national and international law, and the fact that Massachusetts maintained charts showing its claims in official repositories.

The Special Master concludes that the 1881 legislation operated as an effective assertion of Massachusetts sovereignty over Vineyard Sound and therefore created an independent basis for the present Massachusetts claim to the sound as historic inland waters. In the next section, the Special Master will examine whether the Massachusetts historic claim, both as to Vineyard Sound and as to Nantucket Sound, meets the

criteria the Supreme Court has established to judge the validity of a historic claim.

D. Evaluation of the Massachusetts Claim

1. Vineyard Sound

The Special Master concludes that Massachusetts has met its burden of proof with regard to Vineyard Sound and has established historic title to it. As this report has noted, the Supreme Court has established three criteria which a state must meet to validate a historic claim. A state must have exercised sovereign authority over the area in question, over a long period of time, with the acquiescence of foreign powers. *See United States v. Alaska*, 422 U.S. at 189; *United States v. Louisiana*, 394 U.S. at 23-24.

Massachusetts has set forth three separate bases to support its assertion of sovereignty over Vineyard Sound: the doctrine of ancient title, based on the royal charters and the county waters doctrine (waters *inter fauces terrae*); the unique historical and geographic character of the sound; and the 1881 legislation. The Special Master concludes that Massachusetts has met its burden of proof on this issue based on the first and third theories.

As to the second theory, the history of the sounds during the colonial era, although the Commonwealth introduced a substantial quantity of information showing the dependence of the colonists on the resources of shallow off-shore waters, the evidence dealt almost entirely with Nantucket Sound, the shallower of the two sounds. Although Vineyard Sound is also relatively shallow, and was certainly of economic importance to the early settlers, Massachusetts introduced little evidence specific to this sound. Indeed, the evidence, including the location of the major towns in Nantucket rather than Vineyard Sound, points away from Vineyard Sound having had any special economic significance during the colonial period. Massachusetts has failed, even under a lesser burden of proof than the clear beyond doubt standard, to

show that Vineyard Sound had the kind of peculiar history sufficient by itself to support a historic claim. *See Anglo-Norwegian Fisheries Case*, [1951] I.C.J. Reports at 127-33.

In concluding that Massachusetts has shown an assertion of jurisdiction over Vineyard Sound, the Special Master also relies on actions by the federal government during the early National period. In creating a customs enforcement system, the First Congress established a number of customs districts in Massachusetts, including separate ones for Nantucket County and Dukes County (Martha's Vineyard and the Elizabeth Islands):

> The District of Nantucket shall include the Island of Nantucket. The District of Edgartown shall include all the waters and shores within the county of Duke's county [sic] and the town of Falmouth [in Barnstable County of Cape Cod].

Act of July 31, 1789, 1 Stat. 29, 31. The following year, Congress passed a new customs statute. This transferred Falmouth to the District of Barnstable, but otherwise delimited the Edgartown and Nantucket Districts exactly as the 1789 statute had. Act of August 4, 1790, 1 Stat. 145, 146. In 1799, Congress passed yet another customs statute. It repeated verbatim the language of the 1790 statute with respect to the two customs districts in question. Act of March 2, 1799, 1 Stat. 627, 629.

The Special Master considers significant the statutes' references to the "waters and shores within" Dukes County. Attorney General Randolph cited essentially identical language to support his opinion that Delaware Bay formed internal waters of the United States 1 Op. Att'y Gen. 32, 37 (1793). Randolph considered that this inclusion of the waters of counties within a customs district amounted to the assertion of the "exclusive jurisdiction" by the United States. *Id.* The only significant difference between Vineyard Sound and Delaware Bay, aside from the latter's greater size, is that Vineyard Sound is not a bay. However, a close reading of

the Opinion shows that Randolph considered sounds and straits to be as susceptible of an assertion of United States jurisdiction as bays.

Relying on Attorney General Randolph's Opinion, the Special Master concludes that the United States had in fact asserted its "exclusive jurisdiction" over Vineyard (but *not* Nantucket) Sound as early as 1789. The Special Master also concludes that the international community has known of and acquiesced in this assertion of authority since 1793. As the Supreme Court has pointed out:

> something more than the mere failure to object must be shown. The failure of other countries to object is meaningless unless it is shown that the governments of those countries knew or reasonably should have known of the authority being asserted.

United States v. Alaska, 422 U.S. at 200.

France and England, the parties with whose rights Randolph's opinion dealt, were the world's two leading maritime and naval powers and were in the middle of a series of wars which were to last for another 22 years. Because the central issue with which the Opinion dealt was the extent of United States jurisdiction over coastal waters, both England and France needed to know which specific waters the United States intended to protect its neutrality. Both powers must therefore have examined the early customs acts to see which bodies of water were considered to be under United States jurisdiction. Both powers must have realized that Vineyard Sound was such a body of water. Neither party seems to have objected to the exercise of American jurisdiction over Vineyard Sound, or any other coastal waters, including Delaware Bay.

The exercise of sovereignty over Vineyard Sound has been continuous, at least since 1789, first by the United States to enforce its customs laws and then by Massachusetts to enforce its general laws. Massachusetts has asserted its general jurisdiction over the sound at least since 1859. As Massa-

chusetts points out in both its post-trial briefs, no foreign power has ever protested about or refused to acquiesce in the status of Vineyard Sound as internal waters of both Massachusetts and the United States.

2. Nantucket Sound

The situation of Nantucket Sound is considerably different from that of Vineyard Sound in several important respects. Massachusetts has established to the Special Master's satisfaction the fact that either the United States or Massachusetts *could* have treated Nantucket Sound as internal waters under the legal principles applicable in the late eighteenth century. Massachusetts has presented considerable evidence to show that Nantucket Sound was the kind of body of water which seventeenth and eighteenth century English law could have treated as waters *inter fauces terrae* and therefore capable of passing to Massachusetts, and has also shown convincingly that Nantucket Sound formed a unique economic and geographical unit during the colonial era. Both of these factors, however, could only have served to justify an exercise of jurisdiction. They are insufficient by themselves to prove the existence of an actual intent to establish jurisdiction over Nantucket Sound. It is therefore the Special Master's opinion that the Commonwealth has failed to establish that either the United States or Massachusetts ever asserted jurisdiction over the sound until Massachusetts did so relatively recently.

In concluding that Massachusetts has failed to establish its claim to Nantucket Sound, the Special Master paid special attention to two factors. The first of these is the language of the customs acts referred to in the prior section. The Special Master finds significant the failure of any of the acts to define the Nantucket District in terms of the "waters and shores" of Nantucket County. The Special Master concludes from this omission, as the French and English probably did in 1793, that the United States had not asserted its jurisdiction over the sound.

Not only did the United States not claim jurisdiction over Nantucket Sound, but even the evidence introduced by Massachusetts shows that the Commonwealth failed to assert its jurisdiction over the center of Nantucket Sound until relatively recently.

Massachusetts used two theories during the nineteenth century to determine the character of coastal waters. During the first half of the century, Massachusetts asserted its authority only over waters *inter fauces terrae*. It is unlikely that post-colonial Massachusetts ever claimed the interior of Nantucket Sound, especially in light of its judicial adoption of the more restrictive Coke test. *See, Commonwealth v. Peters,* 53 Mass. 387 (1847). Nor has Massachusetts presented any other evidence that it had laid claim to the sound during the first half of the nineteenth century.

During the second half of the century, Massachusetts abandoned the *inter fauces terrae* doctrine to delimit its seaward boundaries, substituting for it a strict distance test. Under this test, Massachusetts claimed only those arms of the sea whose mouths were six nautical miles or less in width. Nantucket Sound clearly did not meet this criterion. Indeed, the official maps Massachusetts issued during this period failed to claim the interior of Nantucket Sound for Massachusetts. These maps depicted Vineyard Sound as within the body of Dukes County, but showed the interior of Nantucket Sound as belonging to no county. *See* Railway and Township Map of Massachusetts, Appendix E to this Report [Mass. Ex. 120].

Based on the absence of evidence showing an assertion of authority over Nantucket Sound during the nineteenth century, and based on the positive evidence of the maps introduced by Massachusetts, the Special Master concludes that, although Massachusetts *could* have asserted a claim to Nantucket Sound, it failed to do so. Therefore, whatever rights it may have had over Nantucket Sound during the colonial period lapsed until the Commonwealth's recent attempt to resuscitate them. The Special Master therefore concludes that

Massachusetts has failed to meet its burden of establishing historic title to Nantucket Sound.

V. INTERNATIONAL STRAITS ANALYSIS

The United States contends that, even if Massachusetts has established a valid title to Vineyard and Nantucket Sounds, it may not claim those waters as internal waters because they are international straits and therefore incapable of being anything but territorial waters.

1. The International Law of Straits

Article 16(4) of the Convention on the Territorial Sea and the Contiguous Zone states that:

> There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign state.

The leading case on international straits is the *Corfu Channel Case (United Kingdom v. Albania)*, [1949] I.C.J. Reports 3. That case established two propositions, codified by the Convention: that, absent a declaration of war, warships have a right of innocent passage through international straits, *id.* at 29; and that only those straits important to international commerce are to be considered international straits. *Id.* at 106. The concept of international straits is therefore a legal rather than a geographical one. *See, United States v. California*, 381 U.S. at 171-72.

The Convention's treatment of the right of innocent passage through international straits comes within the context of its rules governing the territorial sea. This is understandable, especially because the Corfu Channel itself, lying as it does between the Greek Island of Corfu and the Albanian

mainland, is territorial rather than internal waters. The rule of the *Corfu Channel Case* and of Article 16(4) of the Convention is therefore merely an amplification of the general rule reserving a right of innocent passage through territorial waters.

The extent to which waters which might otherwise qualify as internal may be treated as international straits is therefore unsettled in international law. A number of analysts have concluded that even international straits may retain the status of internal waters so long as the interests of the international community are protected and the right of innocent passage is maintained. *See, e.g.*, 1 O'Connell, *The International Law of the Sea*, at 385-88. Moreover, the Convention itself recognizes, in another context, the right of states to treat certain waters as internal waters, so long as they respect the right of the international community to innocent passage. *See*, Convention on the Territorial Sea and Contiguous Zone, Article 5(2).

B. Vineyard Sound and Nantucket Sound as International Straits.

Both Vineyard Sound and Nantucket Sound are without a doubt geographic straits. Their status as international straits is less clear. There is little or no evidence that the sounds were ever important highways for international shipping. Moreover, even if international shipping had once relied on the sounds, their status as internationally important shipping lanes surely ended with the completion of the Cape Cod Canal in 1914. International shipping used the canal after 1914, both because it eliminated a substantially longer route around Cape Cod and because it allowed ships to bypass potentially dangerous shoals off Cape Cod and Nantucket. The United States has introduced no evidence to show that either sound has seen any significant amount of international shipping pass through since 1914.

Moreover, even if some international shipping were using the sounds, that should not by itself cause the sounds to be ineligible for treatment as internal waters. Thus, for example,

the United States has conceded that all of Buzzards Bay forms internal waters of Massachusetts, even though a significant amount of international shipping passes through the Cape Cod Canal.

The Special Master therefore concludes that neither Vineyard Sound nor Nantucket Sound are international straits. Moreover, even if they could so be considered, the Special Master concludes that, just as Massachusetts may treat Buzzards Bay as internal waters to the extent that the sounds meet the other criteria of internal waters, Massachusetts could treat them as internal waters so long as it respects the rights of international shipping.

VI. CONCLUSION

The Special Master finds that Vineyard Sound is a historic bay under Article 7(6) of the Convention on the Territorial Sea and Contiguous Zone. This historic bay is closed in the southeast by a line connecting the outermost point of Cuttyhunk Island with the outermost point of Gay Head, and in the northwest portion of Vineyard Sound with a line connecting West Chop with Nobska Point, and is further subject to the Stipulation in Lieu of Amended Pleadings, filed May 3, 1982.

The Special Master further finds that Nantucket Sound is *not* a historic bay under Article 7(6), and its closing line is, subject to the foregoing, to be generally in accord with the Stipulation in Lieu of Amended Pleadings, filed May 3, 1982, to be modified to provide for the enclosure of Vineyard Sound.

VII. RECOMMENDATIONS

The Special Master recommends that the parties be directed to submit to the Court forms of a declaratory decree in accord with the foregoing findings and conclusions and drawn with

the necessary technical precision to carry them fully into effect.

The decree should provide that each party bear its own costs and that the actual expenses of the Special Master be borne by the parties in equal shares. It should also reserve the jurisdiction of the Court to entertain such further proceedings, enter such orders and issue such writs as may from time to time be deemed necessary or advisable to supplement the decree and give it proper force and effect.

Respectfully submitted,

Walter E. Hoffman
Special Master

ADDENDUM

MISSISSIPPI SOUND CASE

On February 26, 1985, the Supreme Court rendered its opinion in *United States v. Louisiana, et al. (Alabama and Mississippi Boundary Case)*, U.S. , 53 U.S.L.W., 4186 (hereinafter the Mississippi Sound Case).

The prior pages of the Report of the Special Master in the instant case had already been printed and, to avoid the needless expense of reprinting the entire report, the Special Master concluded that an Addendum would be sufficient. References to the Table of Contents, the Table of Authorities, and the Special Master Reports have not been modified to include the very recent decision of the Court, or the Report of Special Master Armstrong in the Mississippi Sound Case. Counsel for the parties were invited to express their views

as to the effect, if any, of the case decided on February 26, 1985, on the case *sub judice*. Of course, counsel had no information as to the prior pages of this report and the conclusions reached therein.

Special Master Armstrong, in the Mississippi Sound Case, had recommended that Mississippi Sound was both a juridical bay and a historic bay. The Court agreed that Mississippi Sound is a historic bay. The Court then noted:

> We therefore need not, and do not, address the exceptions presented by the States of Alabama and Mississippi or those exceptions to the United States that relate to the question whether Mississippi Sound qualified as a juridical bay under Article 7 of the Convention.

Perhaps one of the reasons why the Court declined to rule on the issue of a juridical bay was due to the fact that one week earlier, on February 19, 1985, the Court had handed down its opinion in *United States v. Maine, et al. (Rhode Island and New York Boundary Case)*, in which the Court discussed the elements of a juridical bay, and found that Long Island Sound and a portion of Block Island Sound did fall within that category.

The Mississippi Sound Case appears to be the first finding by the Supreme Court that a specific waterbody does constitute historic waters of the United States, and thus internal waters of the State. The United States argues that the existence of historic waters is determined through application of the three criteria in *The Juridical Regime of Historic Waters, Including Historic Bays, United Nations*, A/CN. 4/143 (1962). Thus it is required that there must be:

(1) a specific claim to the area in question,
(2) an exercise of authority in support of that claim, and
(3) foreign acquiescence in the claim over a long period of time.

The United States contends that the alternative theory, characterized by Massachusetts as "ancient title" is not the equivalent of "historic." It is true, of course, that the area in question must constitute *inland* waters of the United States.

The Mississippi Sound Case recites "a policy of enclosing as inland waters those areas between the mainland and offlying islands that were so closely grouped that no entrance exceeded 10 geographical miles." The United States now argues that this so-called "10 mile rule" was limited to *cul de sac* situations which would include the Mississippi Sound. As the opinion notes, Mississippi Sound is shallow and, except for artificially maintained channels, is not readily navigable for ocean-going vessels, and is merely a *cul de sac* with no reason for an ocean-going vessel to enter the Sound except to reach Gulf ports.

Massachusetts correctly points out that no entrance in the instant case exceeds ten geographic miles. Since the "geographic mile" exceeds the "nautical mile" by 3.30 yards, Massachusetts argues that the widest entrance to Nantucket Sound is "approximately 9.2 nautical miles" and thus below the "ten geographic miles" mentioned in the Mississippi Sound Case. While not stressed in the early stages of this litigation, Massachusetts now takes the position that the general assertion of inland waters jurisdiction to bodies of water such as Nantucket Sound, coupled with the specific Massachusetts fisheries regulation (Mas. Ex. 11), originally enacted in 1932 and applicable only to Nantucket Sound, makes the Mississippi Sound Case a potent factor in favor of Massachusetts.

The Act prohibiting the right to use beam or other trawls to drag for fish during certain parts of the year does include substantially all of Nantucket Sound, but it also makes it unlawful to use such trawls during the month of April in any year (but not in any other month) within three miles of the shore of Nantucket County. The Act, therefore, can be construed as an attempted limitation on the use of trawls to drag for fish in general between May 1 and October 31 of each year, when the public's enjoyment of fishing is prevalent,

but the Act also takes cognizant of the three-mile limitation by permitting the use of trawls within that area for all months except April of each year.

The reliance by Massachusetts upon the 1932 Act is not, in the opinion of the Special Master, sufficient to demonstrate an exercise of authority over Nantucket Sound for any appreciable continuous period of time. *United States v. Alaska*, 422 U.S. 184, 197-200 (1975).[1]

The Mississippi Sound Case does lend support to some of the contentions advanced by Massachusetts. They are as follows:

(1) Disclaimer by the United States — The Facts relating to the disclaimer are fully set forth in pages 13 through 20 of this Report, and will not be repeated. It is sufficient to refer to the Court's final words in the Mississippi Sound Case, slip op. 19, where it is said:

> "That disclaimer, issued while the Court retained jurisdiction to resolve disputes concerning the location of the coastline of the Gulf Coast of the United States, is insufficient to divest the States of their entitlement to the submerged lands under Mississippi Sound.

[1] Massachusetts argues that the rule of the Mississippi Sound Case has been fully met in that

> Prior to its ratification of the Convention on March 24, 1961, the United States had adopted a policy of enclosing as inland waters those areas between the mainland and offlying islands that were so closely grouped that no entrance exceeded 10 geographical miles.

It is true that the distance of the opening to Nantucket Sound is 9.2 miles. It is also true that geographic configuration and vital interests of Massachusetts are properly considered in determining whether Nantucket Sound should be characterized as a historic bay. If this is all that is required, then Massachusetts may properly claim that Nantucket Sound is a historic bay, but the Special Master has noted that, while either the United States or Massachusetts *could* have treated Nantucket Sound as internal waters, their actions and fishing statutes, standing alone, could only serve as an exercise of jurisdiction, but fell short to show any actual intent to establish jurisdiction over Nantucket Sound.

At the time the disclaimer charts were published, the Court was considering No. 35, Original, the case involving the jurisdictional boundaries of the thirteen original States of the Union. Thus, jurisdiction was similarly reserved.

(2) The opinion of Attorney General Edmund Randolph referred to in footnote 4 of the Mississippi Sound Case, and mentioned in this Report of the Special Master at pp. 35, 36, 62, 63, supports the argument that foreign governments would never question the fact that the United States had exercised exclusive jurisdiction over Vineyard Sound.

(3) The Mississippi Sound Case supports the principle as stated in the main portion of this Report that the failure of foreign governments to protest may be sufficient proof of acquiescence or toleration necessary to historic title.

(4) While the opinion in the Mississippi Sound Case does not refer to "ancient title," it does mention, on several occasions, the words "historic title." Without attempting to differentiate between "ancient title" and "historic title," the Special Master is of the opinion that the Court has, at least impliedly, approved a factor of "ancient title" as a criteria for establishing a historic bay. This would include the *inter fauces terrae* doctrine advanced by Massachusetts.

CONCLUSION

The Mississippi Sound Case is a noteworthy decision in that it is the first opinion upholding a State's claim of historic inland waters. Nevertheless, the Special Master adheres to the previously written main portion of this Report and reached the same conclusions, i.e., that Vineyard Sound is a historic bay, but that Nantucket Sound does not meet the necessary test under Article 7(6) of the Convention on the Territorial Sea and Contiguous Zone.

Respectfully submitted,

Walter E. Hoffman
Special Master

APPENDIX A

IN THE

SUPREME COURT OF THE UNITED STATES

No. 35, Original

United States; Plaintiff,

On Joint Motion for Entry of Supplemental Decree

v.

State of Maine, et al. (Massachusetts Boundary Case)

(June 15, 1981)

The Report of the Special Master is received and ordered filed.

SUPPLEMENTAL DECREE

The Court's Special Master having filed a Report recommending the entry of a supplemental decree for the purpose of defining with greater particularity the boundary line between the submerged lands of the United States and the submerged lands of the Commonwealth of Massachusetts, as contemplated by the Court's Decree of October 6, 1975, 423 U.S. 1, and the Court's Order of June 29, 1977, 433 U.S. 917, appointing the Honorable Walter E. Hoffman as Special Master in this cause, and the United States and the Commonwealth of Massachusetts having stated their acquiescence in the recommendations of the said Report:

It is ORDERED, ADJUDGED, and DECREED as follows:

1. The coastline of the Commonwealth of Massachusetts, as that term is used in the Court's Decree herein dated October 6, 1975, shall be, in the area hereafter specified:

(a) A straight line running southwesterly from a point on the mean low water line at Eastern Point on Cape Ann (approximately 42°34'45" N, 70°39'43" W on NOS Chart 13267, 18th Ed.) to a point on the mean low water line seaward of Strawberry Point (approximately 42°15'31" N, 70°46'05" W on the same NOS Chart), thence southeasterly along the line of ordinary mean low water (including closing lines across Scituate Harbor and the North River) to Brant Rock (approximately 42°05'29" N, 70°38'15" W on the same NOS Chart), thence a straight line running easterly to a point on the mean low water line at Race Point on Cape Cod (approximately 42°03'46" N, 70°14'51" W on the same NOS Chart);

(b) A straight line running southeasterly from a point on the mean low water line at Gooseberry Neck (approximately 41°28'43" N, 71°02'05" W on NOS Chart 13218, 21st Ed.) to a point on the mean low water line on the southwestern extremity of Cuttyhunk Island (approximately 41°24'44" N, 70°57'07" W on the same NOS Chart).

2. The reference to the Special Master appointed by the Court on June 29, 1977, is continued in effect, under the terms of the Court's Order of that date, and he is directed to proceed with the cause, holding such further proceedings as may seem advisable until all remaining issues referred to him are ready for submission to the Court by his further report.

3. The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as may from time to time be deemed necessary or advisable to give proper force and effect to this decree or to effectuate the rights of the parties in the premises.

Justice Marshall took no part in the consideration or decision of this matter.

APPENDIX B

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

No. 35, Original

United States of America; Plaintiff
v.
The State of Maine, et al. (Massachusetts)

BEFORE THE SPECIAL MASTER

STIPULATION IN LIEU OF AMENDED PLEADINGS

As originally framed, these proceedings put at issue numerous segments of the Massachusetts coastline from which the territorial sea is measured. Since that time, the parties have sought to narrow the areas of disagreement and have been partially successful. For the purpose of specifying the remaining issues to be presented to the Special Master, the plaintiff, United States of America, and the defendant, Commonwealth of Massachusetts, by their attorneys, do hereby agree as follows:

1. The sole remaining issues to be considered by the Special Master are whether or not Nantucket Sound and Vineyard Sound are inland waters.

2. If both Nantucket Sound and Vineyard Sound are finally determined to be inland waters, the seaward limit of state ownership shall be the line of the territorial sea of the United States as currently shown on C. & G.S. Chart 1209 (Exhibit "A" to Memorandum in Lieu of Amended Complaint), except where a more seaward line results by projecting a line three geographical miles from the segments of the coastline specified in the Court's Decree of June 15, 1981, and from

the following closing lines: from the southern point of Monomoy (Monomoy Point), being considered a part of the mainland, to the northern point of Nantucket Island (Great Point); from the southwestern point of Nantucket Island to the southeastern point of Esther Island; from the northwestern point of Esther Island to the southern point of Tuckernuck Island; from the northwestern point of Tuckernuck Island to the southeastern point of Muskeget Island (excluding the barrier spit in the southern area of Muskeget Island); from the northwestern point of Muskeget Island to Muskeget Rock; from Muskeget Rock to the southeastern point of Martha's Vineyard (Wasque Point); and from Gay Head on Martha's Vineyard to the southwestern point of Cuttyhunk Island, all as described in paragraphs 15(b) and 15(c) of the Memorandum in Lieu of Amended Answer of Massachusetts and shown on Exhibit "A" thereto.

3. If Nantucket Sound is finally determined not to be inland waters, and regardless of the inland status of Vineyard Sound, the limits of the territorial sea in Nantucket Sound are as shown by the lines of federal/state demarcation on C. & G.S. Chart 1209 (Exhibit "A" to Memorandum in Lieu of Amended Complaint), with the following exceptions:

a. There shall be recognized a bay closing line from a point southeast of East Chop (approximately 41°27'30" N, 70°33'18" W on NOS Chart 13233, 8th Ed.) to a point west of Cape Pogue (approximately 41°25'06" N, 70°27'56" W on NOS Chart 13233, 8th Ed.), on the island of Martha's Vineyard, and, pursuant to the Submerged Lands Act, a three geographical mile seaward extension from said bay closing line, in favor of Massachusetts.

b. There shall be recognized a bay closing line from a point on Point Gammon on Cape Cod (approximately 41°36'36" N, 70°15'40" W, on NOS Chart 13237, 26th Ed.) to the southwesternmost point of Monomoy (approximately 41°33'02" N, 70°00'59" W on NOS Chart 13237, 26th Ed.), and, pursuant to the Submerged Lands Act, a three geographic mile seaward extension from said bay closing line, in favor of Massachusetts.

c. There shall be recognized a bay closing line from a point on the west coast of Great Island (approximately 41°37'08" N, 70°16'15" W, on NOS Chart 13229, 15th Ed.) to a point on Hyannis Point, on Cape Cod (approximately 41°37'27" N, 70°17'34" W, on NOS Chart 13229, 15th Ed.), said bay closing line not affecting the limits of the territorial sea.

4. If Vineyard Sound is finally determined not to be inland waters, the seaward limit of state ownership at the southwestern entrance thereto are the limits of the territorial sea of the United States as shown by the line of federal/state demarcation on C. & G.S. Chart 1209 (Exhibit "A" to Memorandum in Lieu of Amended Complaint).

5. The parties do not believe it necessary, for the purpose of this litigation, to determine the limits of inland waters of Massachusetts other than those already agreed upon or put in issue through this stipulation. This stipulation is not to be taken to represent the position of either party on the location of inland waters other than those specifically enumerated.

The parties severally pray for a decree in accordance with their respective positions as set forth above.

UNITED STATES OF AMERICA, PLAINTIFF

By /s/ Louis F. Claiborne
Deputy Solicitor General of the United States

Dated: April 29, 1982

COMMONWEALTH OF MASSACHUSETTS, DEFENDANT

By /s/ Thomas R. Kiley,
First Assistant Attorney General
Department of the Attorney General
Commonwealth of Massachusetts

Dated: April 30, 1982

13227 (formerly C&GS 1209)

LORAN-A/C OVERPRINTED

SOUNDINGS IN FEET

BUZZARDS BAY

NANTUCKET SOUND

MARTHAS VINEYARD

NANTUCKET

LORAN-A
GENERAL EXPLANATION

RATES ON THIS CHART
1H7 3H4 3H5

LORAN LINEAR INTERPOLATOR

United States v Maine (Massachusetts)
No. 35, S. Ct. Original Action
Before the Special Master

MEMORANDUM OF SETTLEMENT
Exhibit 1

MEMORANDUM OF SETTLEMENT
Exhibit 1

The closing lines pencilled on this chart approximate the closing lines described in Paragraph III(3)(a)-(c) of the Memorandum of Settlement.

APPENDIX C
Portion of Chart 13227
NANTUCKET SOUND AND APPROACHES

UNITED STATES - EAST COAST
MASSACHUSETTS

NANTUCKET SOUND AND APPROACHES

Mercator Projection
Scale 1:80,000 at Lat. 41°25'
North American 1927 Datum

SOUNDINGS IN FEET
AT MEAN LOW WATER

BEST AVAILABLE COPY

BEST AVAILABLE COPY

SOUNDINGS IN FATHOMS

13200 OMEGA OVERPRINTED

BAY CLOSING LINE (Massachusetts Claim)

APPENDIX D
Portion of Chart 13200
GEORGES BANK AND NANTUCKET SHOALS

APPENDIX E

WALLING & GRAY'S Railway & Township MAP OF MASSACHUSETTS.

Boston

1871.

SCALE OF MILES

Scale 1/506880 or 8 Miles to one Inch.

H I R E

H O

P L Y M O U T H

B A R N S T A B L E

CAPE COD BAY

BUZZARDS BAY

VINEYARD SOUND

NANTUCKET

MARTHA'S VINEYARD

Plum Island

CAPE ANN

Nahant

Hav.

Mans Land.

Great Pd.

Monomoy I.

Tuckernuck I.

Muskegat I.

Stations.

West Medford, ...5
Mystic, ...
Winchester, ...8
S. Woburn. 9

BOSTON & MAINE.

Boston, ...0
Somerville, ...2
Edgeworth, ...4
Malden, ...6
Wyoming, ...6
Melrose, ...7
Stoneham, ...8
Greenwood, ...9
Wakefield, J., ...9
Wakefield, ...10
Reading, ...12

FITCHBURG.

Boston, ...0
Charlestown, ...
S. Cambridge, ...1½
Prospect St., ...2
Somerville, ...2½
Cambridge, ...3
Brick Yard, Junc.4½
Belmont, ...6
Waverly, ...7
Waltham, ...10
Roberts Crossing,11

L. R. WATERTOWN BR.

Boston, ...0
Charlestown, ...
S. Cambridge, ...1½
Prospect St., ...2
Somerville, ...2½
Cambridge, ...3
Brick Yard Junc.,4½
Concord Turnpike,
Fresh Pond, ...6
Mt. Auburn, ...5½
Arlington St., ...6
Arsenal, ...6½
Watertown, ...8
Tannis Fact., ...9
Bleachery, ...9½
Chemistry, ...10
Waltham, ...10½

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Drawn by F.A. Gray

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Supreme Court, U.S.
FILED
AUG 2 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 35, Original.

In the

Supreme Court of the United States.

OCTOBER TERM, 1985.

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

STATE OF MAINE, ET AL.,
DEFENDANTS.

(MASSACHUSETTS BOUNDARY CASE)

ON REPORT OF THE SPECIAL MASTER.

Exception of the Commonwealth of Massachusetts and Supporting Brief.

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PLAINTIFF,
v.
STATE OF MAINE, ET AL.,
DEFENDANTS.

(MASSACHUSETTS BOUNDARY CASE)

ON REPORT OF THE SPECIAL MASTER.

Exception of the Commonwealth of Massachusetts.

Applying a standard of proof used in international boundary disputes, the Special Master found that Massachusetts had proven its claim of ancient title to the waters and seabed of Nantucket Sound. Report at 51, 58. However, the Special Master felt constrained to rule that Massachusetts must prove its title by evidence which is "clear beyond doubt." Report at 24, 51. Massachusetts takes exception to that ruling and its consequence, that Massachusetts is divested of its title to Nantucket Sound.

Respectfully submitted,

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Attorney General,
HENRY HERRMANN,
Special Assistant Attorney General,
WILLIAM L. PARDEE,
Assistant Attorney General.

Table of Contents.

Statement of the case 1

Summary of the argument 7

Argument 9

I. Whether or not there is an effective disclaimer, Massachusetts need not establish its claim by evidence which is "clear beyond doubt" 9

A. The imposition of such an extreme standard is not supported by the decisions of international tribunals or the common law governing actions to quiet title 9

B. In the context of state-federal marine boundary disputes, even where there is a disclaimer, the imposition of the extreme evidentiary standard finds no support in policy or in the decisions of this Court 14

II. Even if the extraordinary standard applies when there is an effective disclaimer, it does not apply here because the United States has never effectively disclaimed the inland water status of Nantucket Sound 19

Conclusion 23

Addendum 25

Table of Authorities Cited.

Cases.

Cities Service Oil Co. v. Dunlap, 308 U.S. 208 (1939) 9

Pollard v. Hagan, 44 U.S. 212 (1845) 15

Santosky v. Kramer, 455 U.S. 745 (1982) 9n

United States v. Alaska, 352 F.Supp. 815 (D. Alaska 1972), aff'd, 497 F.2d 1155 (9th Cir. 1974), rev'd on other grounds, 422 U.S. 184 (1975) 9, 18, 19

United States v. California, 381 U.S. 139 (1965) 4, 14, 15, 16, 17, 19

United States v. Florida, No. 52 Original, at 42 (Jan. 18, 1974) 6, 17

United States v. Louisiana, No. 9 Original, at 18-19 (July 31, 1974) 6, 18

United States v. Louisiana, 363 U.S. 1 (1960) 14n, 16

United States v. Louisiana (Louisiana Boundary Case), 394 U.S. 11 (1969) 4, 9, 10, 14, 15 et seq.

United States v. Louisiana (Mississippi Sound Case), 105 S.Ct. 1074 (1985) 9, 11, 13, 14, 15 et seq.

United States v. Maine, et al. (Rhode Island, New York) No. 35 Original, at 11 (1984) 6, 17

United States v. Maine, et al., 423 U.S. 1 (1975) 2

United States v. Maine, 433 U.S. 1 (1977) 3

United States v. Maine (Massachusetts Boundary Case), 452 U.S. 429 (1981) 3, 15n

Special Master Reports.

Special Master Report, United States v. Florida, No. 52 Original, January 18, 1974 6, 17

Special Master Report, United States v. Louisiana, No. 9 Original, July 31, 1974 6, 17

Special Master Report, United States v. Louisiana (Mississippi Sound Case) No. 9 Original, April 9, 1984 17

Special Master Reports, United States v. Maine (Rhode Island, New York), No. 35 Original, 1984 6, 17

Statutes and Treaties.

Convention on the Territorial Sea and Contiguous Zone, April 29, 1958
Article 4 11n
Article 7(6) 3

International Regulations for Preventing Collisions at Sea (1972) 20

Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315 15, 16

Federal Regulations.

42 Fed. Reg. 35782, 35783, 35793 (July 11, 1977) 20

Miscellaneous.

Anglo-Norwegian Fisheries Case, [1951] I. C.J. Reports 116 11, 12

2A C.J.S., Adverse Possession § 293 13

74 C.J.S., Quieting Title § 80 13

"Juridical Regime of Historical Waters, Including Historic Bays," [1962] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/143 (1962) 9, 10, 11, 13

No. 35, Original.

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DEFENDANTS.

(MASSACHUSETTS BOUNDARY CASE)

ON REPORT OF THE SPECIAL MASTER.

Brief for the Commonwealth of Massachusetts in Support of its Exception.

Statement of the Case.

A. *Nature of the Present Proceedings.*

The exception which Massachusetts takes to the Special Master's Report is not of the usual kind generated by reports in marine boundary litigation in this Court. Indeed, it is termed an "exception" more in the formal than in the true sense, since no other procedural device obtains in this context. The present situation is unique, as it focuses solely on the applicable standard of proof.

The Special Master indicated that, were this a case of first impression, he would apply a standard of evidence less rigorous

than "clear beyond doubt." Report at 24. He felt, however, that the Court had previously, *by implication*, favored a "clear beyond doubt" standard. *Id*. Nevertheless, the Special Master also adumbrated the view that this might be a proper issue for review and clarification by the Court, and, accordingly, had the foresight to make alternate findings of fact as to the one remaining issue determinative of Massachusetts' claim.[1]

Based upon the age-old application of the eyesight test for demarcation, the Special Master found in the alternative, that Massachusetts did not prevail if held to the "clear beyond doubt" standard, but, on the other hand, that "Massachusetts can therefore establish an ancient title to Nantucket Sound only if the Supreme Court holds that the 'clear beyond doubt' standard is inappropriate for this proceeding." Report at 51.

We, therefore, do not take exception in the customary sense to the Special Master's findings; rather, we pray that the Court adopt the Special Master's alternate finding after a review of the evidentiary principles involved, which would lead to a decree in Massachusetts' favor.

B. *The Prior Proceedings*.

This is the second phase of an action to quiet title commenced by the United States in 1968 against all the Atlantic coastal States except Connecticut. In its Decree of October 6, 1975, the Court affirmed the title of the United States to the continental seabed seaward of a line three geographic miles from the coastline of the United States, and affirmed the title of the defendant States to the seabed landward of the three-mile line. *United States* v. *Maine, et al*., 423 U.S. 1 (1975).

---

[1] The Special Master stated that:

> Nevertheless, to prevent needless relitigation should the Supreme Court decide that Massachusetts is correct on the burden of proof issue, this report shall indicate its conclusions as to the validity of the Massachusetts claim under either standard.

Report at 24.

In January, 1977, the United States and Massachusetts filed a Joint Motion for Supplemental Proceedings to quiet title by determining the location of the Commonwealth's coastline, and the Court referred the matter to the Special Master. 433 U.S. 917 (1977).

Initially, the areas actually in dispute were the bodies of water known as Massachusetts Bay, Buzzards Bay, Vineyard Sound, and Nantucket Sound. Through negotiation, however, the parties substantially reduced the areas in dispute. First, Massachusetts accepted the closing lines proposed by the United States for Massachusetts Bay, and the United States accepted the closing line claimed by Massachusetts for Buzzards Bay. This settlement was approved by the Special Master and the Court. *United States* v. *Maine (Massachusetts Boundary Case)*, 452 U.S. 429 (1981). Second, in a Stipulation in Lieu of Amended Pleadings, filed April 30, 1982, the United States reduced the area claimed by it in Nantucket Sound. *See* Report of the Special Master, Appendix B. There remained for adjudication before the Special Master, then, only the status of the central portion of Nantucket Sound and the status of all of Vineyard Sound.[2]

Following extensive evidentiary submissions, testimony, briefs, and argument by the parties, the Special Master filed a very careful and particular report of his findings and recommendations. In brief, the Special Master found that Vineyard Sound is an historic bay, with appropriate closing lines, under Article 7(6) of the Convention on the Territorial Sea and Contiguous Zone, April 29, 1958 (hereafter the Convention), 15 U.S.T. 1607, T.I.A.S. 5639,[3] that Nantucket Sound is not, and

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[2] The claims of the parties are illustrated on the charts appended to the Report as Appendix C (United States' position, Nantucket Sound only) and Appendix D (Massachusetts' position). As an aid to the Court, we have reproduced a portion of Appendix D (itself a reproduction in part of Massachusetts Exhibit 1) at the end of this Brief.

[3] Article 7(6) of the Convention provides that

> The foregoing provisions [for the delimitation of bays] shall not apply to so-called "historic" bays, or in any case where the straight baseline system provided for in article 4 is applied.

that the baseline or coastline in the area of Nantucket Sound is generally in accord with the Stipulation in Lieu of Amended Pleadings (Appendix B to the Report).

Massachusetts takes no exception to the Report as it pertains to Vineyard Sound and we have been informed that the United States intends to take no exception with respect thereto. With respect to Nantucket Sound, Massachusetts no longer claims historic title, but still asserts that the Sound is inland waters under the doctrine of ancient title, *i.e.*, that the Sound is the Commonwealth's by right of the British Crown's discovery and occupation.

The Special Master ruled that the doctrine of ancient title "is generally accepted under international law," and is an available basis for an historic waters claim in this proceeding by virtue of this Court's determination that principles of international law are to be followed in fixing the coastline of the United States. *See* Report of the Special Master at 26-27, *citing* *United States* v. *Louisiana* (*Louisiana Boundary Case*), 394 U.S. 11, 17-35 (1969); *United States* v. *California*, 381 U.S. 139, 161-167 (1965). As explained by the Special Master, the doctrine differs from the doctrine of historic title in that ancient title is not prescriptive in nature. Ancient title is established by "effective occupation, from a time prior to the victory of the doctrine of freedom of the seas"; it is not necessary to show that the claiming state acquired prescriptive rights in the area as against the community of nations. Report at 25-26.

Massachusetts asserts ancient title to Nantucket Sound as the successor of the British Crown. To establish this proposition, Massachusetts undertook to show (a) that by virtue of discovery and occupation in the colonial period, the Crown acquired title to the Sound and (b) that Massachusetts acquired its title from the Crown by virtue of its colonial charters (or, at the latest, by virtue of the Treaty of Paris in 1783). As for the latter point, the Special Master found that whatever title the Crown acquired by discovery and occupation indeed passed to Massachusetts through the colonial charters. Report at 43.

To establish the former point, *i.e.*, that the Crown acquired title to the Sound, Massachusetts adduced evidence to show (a) that the Sound was inland waters under the doctrine of county waters, which was the municipal law of Britain from at least as early as the Fourteenth Century through at least the end of the Nineteenth Century; and (b) that in the colonial period, British colonists in fact occupied the Sound. The Special Master found that Massachusetts had adduced "sufficient evidence to support a finding that the nature and extent of the colonists' exploitation of the marine resources of the sounds was equivalent to a formal assumption of sovereignty over them." Report at 58. Thus, to establish the Commonwealth's ancient title to Nantucket Sound, it remained only to establish that the Sound qualified in the colonial period as inland waters under the county waters doctrine.

After a thorough review of the English caselaw and treatises, the Special Master concluded that under the English common law both during the colonial period and afterward, an arm of the sea which is *inter fauces terrae* is "within the body" of the adjacent county, and therefore inland waters, if a person standing on one shore can discern the opposite shore. Report at 31-38, 43-47. This rule was applicable to sounds as well as to other arms of the sea. Report at 37-38.

The widest opening into the Sound is between Monomoy (sometimes called Cape Malabar) on Cape Cod and Nantucket Island, a distance at present of about 9.2 nautical miles. Report at 49. By ancient charts and other means, Massachusetts was able to show that Monomoy (or Malabar) existed in colonial times in its present location. The United States, on cross-examination of Massachusetts' expert, adduced testimony that Monomoy has varied in length during recorded history, but probably by no more than two miles, shorter or longer. Report at 50 and n.32. In addition, the Special Master found that people were able to see across the Sound at points wider apart

than the entrance between Monomoy and Nantucket. Report at 50-51. On this evidence, the Special Master concluded that Nantucket Sound "would have been considered waters *inter fauces terrae* before the Revolution." However, the Special Master ruled that this last proposition was not established by evidence which was "clear beyond doubt," due to the lack of evidence as to the exact width of the mouth of the Sound in the colonial period. Consequently, he ruled that "Massachusetts can therefore establish an ancient title to Nantucket Sound only if the Supreme Court holds that the 'clear beyond doubt' standard is inappropriate for this proceeding." Report at 51.

The Special Master stated that "[w]ere this a case of first impression, the Special Master would be inclined to agree with Massachusetts that the 'clear beyond doubt' standard is an impossibly high burden to impose on a state putting forth a historic claim." Report at 24. He noted, however, that the special masters in three earlier coastal boundary cases had construed this Court's opinions to impose just that burden. Report at 22-23, *citing* Report of the Special Master, *United States* v. *Maine, et al. (Rhode Island, New York)*, No. 35 Original, at 11 (1984); Report of the Special Master, *United States* v. *Florida*, No. 52 Original, at 42 (January 18, 1974); Report of the Special Master, *United States* v. *Louisiana*, No. 9 Original, at 18-19 (July 31, 1974). Although none of these rulings as to the standard or quantum of proof was explicitly approved by this Court, the Special Master deemed himself to be bound, reasoning that, in approving the reports, this Court had implicitly affirmed the special masters' rulings that the states must establish their claims by evidence that is "clear beyond doubt." Report at 24.

In sum, Massachusetts has established that Nantucket Sound is historic inland waters under the doctrine of ancient title, but has not done so by evidence which is clear beyond doubt. Massachusetts takes exception only to the ruling that the "clear beyond doubt" standard is applicable in this case.

Summary of the Argument.

I. This Court has determined that coastal boundary litigation is to be governed by the principles of international law, as if the claimant state were an independent sovereign, and the United States were a contending foreign nation. In such disputes, principles of international law require the claiming state to prove its claim, but impose no heightened burden. Rather, if the claiming state persuades the finder of its claim, as Massachusetts did here, then it is entitled to prevail.

There is no reason in policy or law to impose a more onerous burden on a State, even where the United States purports to have disclaimed an historic waters claim. The factual significance of a disclaimer will of course vary from case to case, and so should be left to the tribunal in each case to determine. Nor is a disclaimer of historic inland waters entitled to weight beyond its evidential significance in a particular case on the ground that it represents an exercise of the foreign affairs power. First, to hold otherwise would be to sanction an impermissible contraction of the State's territory. Second, to give any weight to a disclaimer beyond its evidential value in the circumstances of a particular case would be inconsistent with the Submerged Lands Act. In this domestic context, Congress's grant to the States of seabed ownership beyond the baseline does not trench on the Executive's authority over foreign affairs. As construed by this Court, the Act makes part of the baseline for the grant congruent with the line enclosing inland waters, and leaves to the Court, not the State Department, the task of determining the coast line, with the understanding that

the States' historic inland waters will not be contracted by the Act. Since the United States' argument would make the Act an instrument for the severe contraction of State inland waters, it must be rejected. This Court's opinions neither hold nor imply that in the face of a disclaimer the States must prove their historic inland waters claims by evidence which is clear beyond doubt.

II. If this Court's prior opinions impose an especially rigorous standard of proof on States asserting an historic waters claim, that standard only applies when the United States unequivocally and for reasons independent of the litigation has taken a contrary position in its international relations. But the Special Master found that the United States' alleged disclaimer of the inland waters status of Nantucket Sound was ineffective because (a) it was not unequivocal, (b) its genuineness was suspect, and (c) like the alleged disclaimer of the inland waters status of Mississippi Sound, it was adopted during the pendency of litigation with Massachusetts. Report at 19-20, 69.3-69.4. Consequently, Massachusetts was not required to prove its case by evidence which is clear beyond doubt.

Since the Special Master was persuaded, albeit not by the standard of "clear beyond doubt," of Massachusetts' ancient title to Nantucket Sound, the Court should decree that Nantucket Sound is historic inland waters, based upon ancient title, and within the boundaries of Massachusetts.

Argument.

I. Whether or Not There Is an Effective Disclaimer, Massachusetts Need Not Establish Its Claim By Evidence Which Is "Clear Beyond Doubt."

A. *The Imposition of Such an Extreme Standard is Not Supported by the Decisions of International Tribunals or the Common Law Governing Actions to Quiet Title.*

This Court has repeatedly said that a State's historic waters claim is to be judged according to principles of international law. *See, e.g., United States* v. *Louisiana* (*Mississippi Sound Case*), 105 S.Ct. 1074, 1078-1080 (1985); *United States* v. *Alaska*, 422 U.S. 184, 188-189 (1975). Unless some policy unique to domestic coastal boundary litigation requires otherwise, the Court's reference to international rules and principles presumably includes such issues as the burden and standard of proof,[4] for those issues are as determinative of the outcome of a dispute as are the substantive elements of the claim. *Cf. Cities Service Oil Co.* v. *Dunlap*, 308 U.S. 208, 212 (1939) (burden of proof is "part of the very substance" of a claim).

In order to determine the standard of proof applicable to historic waters claims, we turn first to the "Juridical Regime of Historic Waters, Including Historic Bays," [1962] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/143 (1962) (hereafter the *Juridical Regime*), which this Court has relied upon as "authoritative." *Mississippi Sound Case*, 105 S.Ct. at 1080. *See also United States* v. *Alaska*, 422 U.S. at 200; *Louisiana*

[4] The Court recently demonstrated very clearly the connection between substantive policy and the standard of proof in *Santosky* v. *Kramer*, 455 U.S. 745 (1982), holding that states may not terminate parental rights in an adoption proceeding without proving parental unfitness by clear and convincing evidence.

Boundary Case, 394 U.S. at 23-26 nn.27-30, 76 n.103. With regard to the *burden* of proof (as distinguished from the quantum or standard of proof), the *Juridical Regime* holds that

> The general statement that the burden of proof is on the State claiming historic title to a maritime area is not of much value. . . . The elements of the title have evidently to be proved to the satisfaction of the arbitrator, otherwise he will not accept the title. . . . In a dispute, each party has to prove the facts on which he relies, otherwise the arbitrator will not take these alleged facts into account. Furthermore, as regards the interpretation of the law and the evaluation of the facts in light of this interpretation, each party will naturally try to persuade the arbitrator to adopt the party's views in this respect; to the extent that the party does not succeed in this, it will obviously have to bear the burden of his failure.

Juridical Regime ¶ 158; *see id.* ¶ 188.

With regard to the quantum or standard of proof which will be sufficient to establish an historic waters claim, the *Juridical Regime* rejects the view of some writers that an historic waters title is "exceptional," and therefore that the standard of proof must be rigorous. *Id.* ¶¶ 40, 54-59, 78. Instead, the author concludes that

> the widely held opinion that the regime of "historic waters" constitutes an exception to the general rules of international law regarding the delimitation of the maritime domain of the State is debatable. The realistic view would seem to be not to relate "historic waters" to such rules as an exception or not an exception, but to consider the title to "historic waters" independently, on its own merits.

Id. ¶ 184. And, in assessing an historic waters claim, the *Juridical Regime* advises that "the existence of such a title is to a large extent a matter of judgement [*sic*]" and that "[a] large element of appreciation seems unavoidable in this matter. . . ." *Id.* at 187. *See also Mississippi Sound Case*, 105 S.Ct. at 1085 (endorsing a "flexible," and "relaxed" approach to the evidence).

Thus, there is nothing in the *Juridical Regime* that even implies that a claimant state has to meet this exceptional "clear beyond doubt" standard of proof, and every indication therein is to the contrary. Moreover, the decisions of international tribunals do not require of the claimant to historic waters proof meeting this draconian standard. Indeed, again, every indication is to the contrary. Illustrative is the treatment given historical evidence by the International Court of Justice in the *Anglo-Norwegian Fisheries Case* [1951] I. C.J. Reports 116, 142, a case which the Special Master discussed at length in his Report at 26, 56-57. That case involved the permissibility of a *method* of straight baseline delimitation[5] (which Massachusetts does not seek to apply in the present case).

A crucial element of Norway's claim was that the areas selected to be enclosed had been, in fact, the subject of ancient and peaceful exclusive use by the inhabitants of the adjacent land. In its concluding discussion, the majority opinion evaluated the evidence adduced in this regard by Norway:

> These ancient concessions tend to confirm the Norwegian Government's contention that the fishery

[5] The case was, of course, decided prior to the provision for this method as an optional alternate in the Convention, Article 4.

zone reserved before 1812 was in fact much more extensive than the one delimited in 1935. It is suggested that it included all fishing banks from which land was visible, the range of vision being, as is recognized by the United Kingdom Government, the principle of delimitation in force at that time. The Court considers that, although it is not always clear to what specific areas they applied, the historical data produced in support of this contention by the Norwegian Government lend some weight to the idea of the survival of traditional rights reserved to the inhabitants of the Kingdom over fishing grounds included in the 1935 delimitation, particularly in the case of Lopphavet. Such rights, founded on the vital needs of the population and attested by very ancient and peaceful usage, may legitimately be taken into account in drawing a line which, moreover, appears to the Court to have been kept within the bounds of what is moderate and reasonable.

Anglo-Norwegian Fisheries Case, [1951] I. C.J. Reports at 142. In upholding Norway's contention, the characterizations which the Court applied to Norway's evidence ("tend to confirm," "it is suggested," "although it is not always clear", and "lend some weight to") demonstrate that the Court did not have in mind an "exceptional" standard of proof (such as "clear beyond doubt").[6]

[6] An interesting parallel between the *Fisheries Case* and the case at bar is worth noting. The International Court of Justice was imposing a non-rigorous evidentiary burden as to the applicability of a generally accepted eyesight test to a specific coastal area; that is the very issue as to which the Special Master made his alternate finding which is determinative here.

In this case, assessing Massachusetts' claim on its own merits, the Special Master was persuaded that Massachusetts has an ancient title to Nantucket Sound, *i.e.*, a title based upon discovery and occupation as an original mode of acquisition. Report at 51, 58. *See Juridical Regime* ¶ 71. He was unpersuaded that the United States had effectively disclaimed this title. Report at 19-20. *See Mississippi Sound Case*, 105 S.Ct. at 1086. "On its own merits," therefore, under principles of international law, Massachusetts' claim to Nantucket Sound should prevail.

It is perhaps useful to note that if the Court were to look to the domestic common law rather than to international law for the applicable standard of proof, the result would be the same. In proceedings to quiet title (which this case is) or to remove clouds therefrom, the claimant need only prove his case by a preponderance of the evidence. *See* 74 C.J.S., Quieting Title § 80. Where the claim is based upon adverse possession, a somewhat stricter standard has been imposed in some cases, 2A C.J.S., Adverse Possession § 293, but it bears noting once again, as the Special Master determined, Report at 25, that Massachusetts' ancient title claim is not prescriptive in nature.[7]

[7] Massachusetts' claim is not one of adverse possession. Historic inland waters claims in general are not accurately analogized to adverse possession. *See Juridical Regime* ¶¶ 65-68. This is true *a fortiori* of an historic waters claim based on ancient title, since in such a case the territory discovered and occupied by the claimant is *terra nullius*, *i.e.*, territory in which no other nation, nor even the community of nations, had a claim or interest. *Id.* ¶¶ 69-71. *See* Report at 25-26. Under the ancient title doctrine, the claimant's original title is clear, not adverse, and is fortified by usage. *Juridical Regime* ¶ 71. To put the matter differently, an historic title claim may be prescriptive, in the sense that it seeks to "divest" the community of nations of its interest in an area; but in this case, where the Special Master has found a non-prescriptive ancient title, the imposition of the evidentiary burden urged by the United States would have the effect of divesting Massachusetts of its title.

B. *In the Context of State-Federal Marine Boundary Disputes, Even where there Is a Disclaimer, the Imposition of the Extreme Evidentiary Standard Finds No Support in Policy or in the Decisions of this Court.*

The United States has repeatedly argued that a special rule should exist in cases in which it disclaims historic waters title. Here, a distinction must be drawn between the argument that a disclaimer should be given conclusive or extraordinary weight for reasons of policy, and the argument that it should be given such weight because of its evidentiary significance to the issues at hand. The Commonwealth does not question the proposition that a disclaimer by the United States may sometimes, as a matter of fact, count heavily against a State's historic waters claim; but the factual significance of a disclaimer obviously depends on the circumstances. A disclaimer broadcast to the world may have little or no significance because of its recency or inconsistency with prior conduct or the weight of the evidence. *See Mississippi Sound Case*, 105 S.Ct. at 1086. Since the significance of a disclaimer in this sense is circumstantial, it would be nonsensical to assign any particular weight to disclaimers in general on an *a priori* basis.

The United States, however, appears to argue that special burdens should be imposed upon the States, in cases where it has disclaimed historic title, for reasons of policy, because it makes such disclaimers in the exercise of its foreign affairs power. *See, e.g., Louisiana Boundary Case*, 394 U.S. at 75-76. This is only an argument of opportunity, however, since it is clear that there is no inherent connection between domestic boundary litigation and international affairs. *See, e.g., United States* v. *Louisiana*, 363 U.S. 1, 30-36, 51 (1960) (executive prerogatives are not implicated in the granting of seabed rights to the States). The opportunity to make the argument derives from the Court's decision in *United States* v. *California*, 381

U.S. 139, 161-167 (1965), to apply the provisions of the Convention in litigation over coastal boundaries.[8]

The argument that the United States' position is conclusive has been accepted with respect to claims based on a system of straight baselines, and claims based on the concept of fictitious bays. *Id.* at 167-168, 172. It has been rejected however with respect to historic waters claims. *Mississippi Sound Case*, 105 S.Ct. at 1086 (disclaimer was insufficient to defeat previously ripened historic waters title); *Louisiana Boundary Case*, 394 U.S. at 77. As the Court has stated, to decline to give effect to an otherwise valid historic waters claim, on the basis of Executive action after the claim is perfected, would be to sanction "an impermissible contraction of territory" by the Executive. *See Louisiana Boundary Case*, 394 U.S. at 77 n.104.

Furthermore, not only would such a result be questionable under the Constitution, but it would also contravene the terms and policy of the Submerged Lands Act. While Massachusetts' title to the seabed of its inland waters rests upon Constitutional grounds, *see Pollard* v. *Hagan*, 44 U.S. 212, 230 (1845), and is not dependent upon legislation, the Submerged Lands Act is nevertheless highly relevant to this discussion, since in fact the congressionally chosen baseline for the grant under that Act is congruent with the seaward limit of inland waters. Under

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[8] The argument is opportunistic in another sense. In this case, the United States has said that it regards coastal boundary determinations to be binding in its international dealings only in the usual case and for the time being. Brief for the United States before the Special Master at 8 and n. The State Department expert testified before the Special Master that the Coastline Committee does not deem itself bound by decrees in domestic coastal boundary litigation. Transcript at 93. For example, long after the United States had stipulated to the Buzzards Bay closing line, *see* 452 U.S. 429 (1981), the Coastline Committee continued to debate whether its charts should be redrawn to reflect that line. See Massachusetts Exhibit 30, Coastline Committee minutes of December 19, 1981, at 2.

that Act, as the Court has said, Congress left the task of delimiting inland waters, for the purposes of the Act, to the Court, not the State Department. *United States* v. *California*, 381 U.S. at 164-165. Moreover, if Congress left the Court free to accept or reject particular geographic methods for delimiting inland waters under the Act, it is nevertheless clear that it intended to leave historic inland waters (however defined by the Court) undisturbed. *Id.* at 150-160. Since in enacting the Submerged Lands Act Congress was not constrained in its choice of baselines by the United States' position in international affairs, *United States* v. *Louisiana*, 363 U.S. at 30-36, it would appear inconsistent with the Act to give any weight to a disclaimer beyond its inherent evidential significance on the ground that it is an exercise of the foreign affairs power. Consistent with this view is the Court's ruling in the *Louisiana Boundary Case* that a State's claim of historic waters is to be treated "as if it were being asserted by the national sovereign and opposed by another nation." 394 U.S. at 77. In that framework, the disclaimer in this case has the same significance as a protest by a foreign nation, and no more.[9]

Although foreign policy considerations do not require that the States carry an extraordinary burden of proof, the Special Master nevertheless considered this Court's previous decisions to implicitly approve the imposition of a "clear beyond doubt" burden on the States. Report at 24, *quoting United States* v. *California*, 381 U.S. at 175, and *Louisiana Boundary Case*, 394 U.S. at 77. However, the immediate question in each case was whether disclaimers are to be treated as conclusive. In *California*, the question did not need to be reached because the State's case was "questionable" — so much so that, without imposing any special burden on it, the Special Master still found that the State had not made its case. 381 U.S. at 174.

[9] In some cases, a disclaimer might also count as evidence against a claim, if for instance it was made while the claim was still ripening. This is not such a case. *See Mississippi Sound Case*, 105 S.Ct. at 1056.

In passing, the Court expressed its reluctance to hold a disclaimer conclusive in all circumstances, including the extreme case, in which the evidence was "clear beyond doubt." But this was not to suggest that a disclaimer would be conclusive *except* in the extreme case. In the *Louisiana Boundary Case*, the Court refused to give a disclaimer conclusive effect even though the evidence of the historic waters claim was not "clear beyond doubt," because to do so would be "to permit the National Government to distort [international law] principles." 394 U.S. at 77.

It may be that the masters in two previous cases have construed this Court's opinions to require the States to prove their historic waters claims by evidence which is clear beyond doubt. *See* Report at 23-24. However, those specific rulings have not been confirmed by this Court. In *United States* v. *Maine (Rhode Island and New York)*, No. 35, Original (1984), the States appear not to have focused on the burden of proof before the Special Master, and they abandoned their historic waters claim after the report was filed. Similarly, Florida apparently did not contest the Special Master's adoption of the "clear beyond doubt" standard in its case. *See* Report of the Special Master at 42, *United States* v. *Florida*, No. 52, Original (January 18, 1974).

The Special Master also referred to a Report in *United States* v. *Louisiana*. *See* Report at 23-24, *citing* Report of the Special Master at 18-19, 21-22, *United States* v. *Louisiana*, No. 9, Original (July 31, 1974). There, however, the Special Master ruled that the State's evidence, like that in *United States* v. *California*, was so questionable that the disclaimer was decisive. The master thus avoided the necessity of determining the precise standard of proof; and the same master in his report in the *Mississippi Sound Case* again avoided that determination, while indicating his doubt that the proper standard is "clear beyond doubt." Report of the Special Master at 44,

United States v. *Louisiana (Alabama and Mississippi)*, No. 9, Original (April 9, 1984). *Accord, United States* v. *Alaska*, 352 F.Supp. 815, 819 (D. Alaska 1972), *aff'd*, 497 F.2d 1155 (9th Cir. 1974), *rev'd on other grounds*, 422 U.S. 184 (1975).

Furthermore, in *Alaska*, the United States pressed strongly the argument that a disclaimer in whatever form, whenever made, is conclusive, except possibly where the evidence is clear beyond doubt that an historic title had ripened prior to the disclaimer. *See* Petition for a Writ of Certiorari at 18-20, *and* Brief for the United States at 53-60, *United States* v. *Alaska*, 422 U.S. 184 (1975). Without discussing the standard of proof issue, this Court reversed the lower court decision because the evidence simply did not show an unequivocal assertion of dominion over the disputed waters, or foreign acquiescence therein. 422 U.S. at 190, 196-197, 199-200, 202-203. If anything, the Court's discussion of the evidence suggests that no exceptional standard was being applied. Of great significance, however, is the Court's response to the United States' argument concerning its alleged disclaimers:

> The United States has argued that historic title to Cook Inlet is defeated by several United States disclaimers of sovereignty over the waters of lower Cook Inlet. The Court previously has discussed the importance of governmental disclaimers in weighing claims to historic title in actions of this kind. . . . The District Court rejected the disclaimers on the grounds that they were ill-advised and, perhaps, self-serving. . . . Inasmuch as we have concluded that none of the facts relied upon by the District Court suffice to establish historic title, we have no occasion to consider whether the disclaimers of the United States could have defeated otherwise sufficient facts.

Id. at 203-204 n.17. If this footnote does not actually reject the "clear beyond doubt" standard, it at least suggests that the question whether a State must meet that standard is yet to be decided. *See also Mississippi Sound Case*, 105 S.Ct. at 1086.

In sum, no reason in policy or law supports the United States' argument that its disclaimer should be given weight beyond its evidential value or that Massachusetts should carry a heavier burden because, some three centuries after the events on which the title is based, the United States purports to have disclaimed historic waters status of the Sound. *See id.*

II. Even if the Extraordinary Standard Applies When there is an Effective Disclaimer, It Does Not Apply Here Because the United States has Never Effectively Disclaimed the Inland Water Status of Nantucket Sound.

Whenever this Court has used the phrase "clear beyond doubt," it has used it in connection with the question of the effectiveness of a disclaimer. *See Mississippi Sound Case*, 105 S.Ct. at 1085; *Louisiana Boundary Case*, 394 U.S. at 77; *United States* v. *California*, 381 U.S. at 175. *See also United States* v. *Alaska*, 422 U.S. at 203-204 n.17 (declining to decide whether a disclaimer "could have defeated otherwise sufficient facts"). Thus, if imposition of an extraordinary burden on a claimant State is ever required by this Court's decisions, such is not the case where there has not been an effective disclaimer.

In the case of Nantucket Sound, the Special Master dealt with the alleged disclaimer of the inland waters status of Nantucket Sound by discussing the evidence pertaining to the same 1971 series of Coastline Committee charts that were relied on in the *Mississippi Sound Case*, 105 S.Ct. at 1085. The Special Master found that those charts were ineffective to disclaim the inland waters status of Nantucket Sound.

In the first place, the Special Master found that the effectiveness of the Coastline Committee charts was vitiated, as to Nantucket Sound, by the Coast Guard's own independent determination under its statutory authority that inland navigational rules applied in Nantucket Sound. Report at 19. Pursuant to the International Regulations for Preventing Collisions at Sea, 1972 (1972 COLREGS), 28 U.S.T. 3459, T.I.A.S. 8587, inland rules may not be applied to any area of the high seas, or indeed (as the Coast Guard construed the COLREGS) to territorial waters "outside of rivers, harbors, and inland waterways." Massachusetts Exhibit 19; 42 Fed. Reg. 35782, 35783, 35793 (July 11, 1977). In determining to apply the inland rules in Nantucket Sound, the Coast Guard therefore determined that the Sound is inland waters. For this reason, the Special Master determined that the lines drawn by the Coast Guard under the COLREGS were of a different nature, and had a different significance, than the Coast Guard lines previously considered by this Court. Report at 17-18, *discussing Louisiana Boundary Case*, 394 U.S. at 17-21. Moreover the regulations were necessarily disseminated widely in the international community, and encountered no foreign protest. Report at 16-20.[10]

[10] The Special Master found in part that

> The Coast Guard was aware of this requirement [that inland rules could only apply to internal waters] and drew the lines in accord with its best independent interpretation of international law. . . .
>
> [A]ll seagoing countries engaged in commerce with the United States knew or should have known of the 1972 COLREGS lines. . . . Therefore, the failure of any government to remonstrate over the drawing of these lines indicates that other countries accepted the validity of designating the sounds as internal waters of the United States.

Report at 20.

In sum, the only alleged disclaimer by the United States, the Coastline Committee charts, was flatly controverted by the United States itself in its international dealings.

The Special Master also considered the Coastline Committee charts to be ineffective as a disclaimer because the conduct of the United States in this litigation cast doubt on the genuineness of its purported disclaimer.[11] Report at 20. Although the Special Master emphasized the United States' reversal of its position regarding Buzzards Bay (which it also purportedly disclaimed), the record is replete with evidence supporting the suspicion. For instance, Massachusetts demonstrated that the Coastline Committee did not consider itself authorized to determine whether a particular body of water was historic inland waters. Report at 14.[12] Thus, whether or not the charts might

[11] Plainly, if extraordinary weight is to be given to a disclaimer, for the reason that it is an exercise of the foreign affairs power, no such weight should be given to a disclaimer which is not genuinely an expression of that power.

[12] On the face of the 1971 charts, the Committee affixed the caution that

> The lines drawn on this document delimit provisionally the territorial sea, contiguous zone, and certain internal waters of the United States. They have been prepared by an interdepartmental committee and represent its interpretation of relevant legal principles as applied to the geographical information shown in a Coast and Geodetic Survey nautical chart which has been used as a base. These lines are subject to revision whenever it is required by amplification or correction of the information shown on the chart or by reinterpretation of the legal principles involved. . . .

United States Exhibits 18a, 18b. In view of this caution, Massachusetts argued and still maintains, that the Coastline Committee charts could not be reasonably understood as a disclaimer of the historic inland waters status of any body of water not shown to be enclosed on the charts. Presumably, foreign nations would have been so advised had they made inquiry as to the meaning of the caution. Indeed, the record includes letters transmitting the charts to foreign governments and calling particular attention to the caution. United States Exhibits 15-18. The Committee itself considered that the caution would adequately "limit the extent to which these documents [*i.e.*, the charts] can properly be relied on." United States Exhibit 14.

nevertheless operate as a disclaimer of such waters, they do so by accident rather than design. Consequently, no special burden should be imposed on Massachusetts on the theory that the charts represent an exercise of the foreign affairs power.

The United States' conduct with respect to the 1977 Coast Guard lines is also revealing in this regard. That the Coast Guard treated the Sound as inland waters for purposes of the COLREGS came to the attention of the Justice Department during discovery in this case. After a series of Coastline Committee meetings, the Coast Guard was persuaded to confess error on the record and to redraw its lines to conform them to the United States' litigation posture. Report at 17. As the Special Master obliquely suggested, Report at 17, 18 and n.6a, where the only recent governmental statement not driven by coastal boundary litigation favors the State's position, and where the Justice Department is shown to have brought its influence to bear "to bring [the Coast Guard's safety regulations] into accord with the litigation posture of the United States," Report at 17, 18, the United States may fairly be said to have distorted principles of international law, in the name of external affairs, to gain domestic advantage. *See Louisiana Boundary Case,* 394 U.S. at 77.

Finally, the Special Master also concluded that the Coastline Committee charts did not constitute an effective disclaimer because they were published while the Court was considering the first phase of this case. Report at 69.3-69.4. In this respect, the Special Master followed the opinion of this Court in the *Mississippi Sound Case,* 105 S.Ct. at 1085-1086. Although the status of Nantucket Sound was not specifically before the Court when the charts were published, neither was the status of the Mississippi Sound then in active litigation.[13] Moreover,

[13] Supplemental proceedings to determine the status of Mississippi Sound were commenced in February and March, 1980. *See* 445 U.S. 923 (1980) (as to Alabama); 444 U.S. 1064 (1980) (as to Mississippi).

the evidence in this case positively demonstrates that the United States already considered Massachusetts' coastline to be in litigation in 1970, for it advised the Commonwealth by a letter in May of 1970 that "all contacts with the Federal Government relating to our litigation with your State over the location of the coastline should be made through the Department of Justice." United States Exhibit 34.

In sum, because the United States' first and only purported disclaimer, in 1971, of the inland waters status of Nantucket Sound was contradicted by its international position as articulated by the Coast Guard, because it is not a genuine exercise of the foreign affairs power, and because it was announced during the pendency of this litigation and is now advanced to prevent recognition of a claim which ripened (as the Special Master found) long ago, that disclaimer is ineffective. Accordingly, because there was no effective disclaimer, Massachusetts is not required to demonstrate its historic waters claim by evidence which is "clear beyond doubt," even if such a standard is found to apply in disclaimer cases.

Conclusion.

This, then, is the point that has been reached: the establishment of Massachusetts' ancient title hinges upon the choice of the required quantum of proof. What the United States seeks to require of Massachusetts is that it prove, by an evidentiary standard sufficiently rigorous to convict a person of a criminal offense, that one could see across the entrance to Nantucket Sound several centuries ago as readily as one can today. This, it should be noted, in the face of evidence acceptable to the Special Master that one indeed could have done so, and, moreover, in the total absence of any evidence (as opposed to

speculation) by the United States indicating that one could not see across that entrance. Accordingly, for the reasons stated, we respectfully pray that the Court adopt and confirm the alternate finding of the Special Master that entitles Massachusetts to a decree in its favor.

Respectfully submitted,

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Addendum.

Excerpt from Massachusetts Exhibit 1, showing the closing lines claimed by Massachusetts in the area of Nantucket Sound and Vineyard Sound, and the closing line claimed by Massachusetts and decreed by the Court in the area of Buzzards Bay.

OMEGA LINEAR INTERPOLATOR

CURRENT DIAGRAM

GEORGES BANK AND NANTUCKET SHOALS

Explanation

Hourly directions and velocities of tidal currents at thirteen stations are shown by arrows. The length of the arrow from the center of the circle represents the average velocity on a scale of one inch equals two knots. The figures at the arrow heads are the hours after the time of maximum flood at Pollock Rip Channel, the daily predicted times of which are given in the National Ocean Survey Atlantic Coast Current Tables. The velocities plotted should be increased by 20 per cent when the moon is full or new and decreased by 20 per cent when the moon is on first or third quarters. For effect of wind on tidal currents, see Current Tables, Atlantic Coast.

SCALE OF VELOCITIES

1 0 1 2 KNOTS

CAUTION

Temporary changes or defects in aids to navigation are not indicated on this chart. See Notice to Mariners.

Floating aids (other marks or when on-station) in this chart aids to navigation are subject to being replaced by other types or removed. For details see U.S. Coast Guard Light List.

CAPE COD BAY

CAPE COD

(chart 3246)

DUMP SITE

(see note S)

BUZZARDS BAY

(see chart 3237)

NANTUCKET SOUND

(see chart 3237)

(see chart 3218)

Great Round Shoal Channel

(see chart 3237)

Tuckernuck I

Muskeget I

Cape Poge

Chatham Roads

Pollock Rip Channel

Monomoy Point

Nauset Beach

Provincetown

Plymouth

Hyannis

Falmouth

Edgartown

Vineyard Haven

Nantucket

Woods End

Race Point

Highland

Chatham

Wellfleet

Orleans

Barnstable

Sandwich

Scituate

Duxbury

Marshfield

Gurnet Point

Manomet Point

Saquatucket Harbor

Cotuit

Osterville

Centerville

Hyannis Harbor

Hyannis Port

Barnstable Harbor

Sesuit Harbor

Wychmere Harbor

Pleasant Bay

Nauset Harbor

Nauset Inlet

Nauset Beach

Provincetown Harbor

Provincetown Channel

Wood End

Race Point

Highland

Chatham

Wellfleet

Orleans

Barnstable

Sandwich

Scituate

Duxbury

Marshfield

Gurnet Point

Manomet Point

Saquatucket Harbor

Cotuit

Osterville

Centerville

Hyannis Harbor

Hyannis Port

Barnstable Harbor

Sesuit Harbor

Wychmere Harbor

Pleasant Bay

Nauset Harbor

Nauset Inlet

Nauset Beach

Provincetown Harbor

Provincetown Channel

70°

69°

68°

42°

40°

30°

20°

Supreme Court, U.S.
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CLERK

(3)

No. 35, Original

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES, PLAINTIFF

v.

STATE OF MAINE, ET AL.
(MASSACHUSETTS BOUNDARY CASE)

ON THE REPORT OF THE SPECIAL MASTER

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

	Page
Introduction and summary of argument	1
Argument:	
A. The Commonwealth's claim to Nantucket Sound is expressly (and necessarily) founded on an alleged colonial title	5
B. No inland water title to the Sound was perfected in colonial times	7
C. No colonial title to the Sound survived independence or the formation of the national Union	10
D. Any colonial title to the Sound that survived statehood was later voluntarily renounced or abandoned by the Commonwealth	14
E. Any colonial title to the Sound that survived statehood was effectively repudiated by the United States	17
F. In light of the federal disclaimers, the Commonwealth must establish the original existence of colonial title to Nantucket Sound and its survival to the present day by evidence "clear beyond doubt"	24
Conclusion	29
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Alabama & Mississippi Boundary Case, No. 9, Orig. (Feb. 26, 1985) 5, 6, 14-15, 19, 21, 24, 25, 27, 28

Annakumaru Pillae v. *Muthupayal*, 27 Indian Law Rept. (Madras) 551 8

California v. *Nevada*, 447 U.S. 125 16

California ex rel. State Lands Commission v. *United States*, 457 U.S. 273 ..... 21, 22, 23, 24

Cases—Continued:

	Page
Commonwealth v. *Peters*, 53 Mass. (12 Met.) 387	12
Hughes v. *Washington*, 389 U.S. 290	21, 24
Louisiana v. *Mississippi*, 202 U.S. 1	13
Louisiana Boundary Case:	
No. 9, Orig. (July 31, 1974), approved, 420 U.S. 529	10, 25
394 U.S. 11	9, 10, 14, 21 ,22, 23, 26, 27
420 U.S. 529	19
Manchester v. *Massachusetts*, 139 U.S. 240	13, 14
Oregon ex rel. State Land Board v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363	21
Pollard v. *Hagan*, 44 U.S. (3 How.) 212	20-21, 23
Rhode Island & New York Boundary Case, No. 35, Orig. (Feb. 19, 1985)	5, 9, 13
United Kingdom v. *Albania*, 1949 I.C.J. 1	9, 18
United States v. *Alaska*, 422 U.S. 185	10, 14, 27
United States v. *California*:	
No. 6, Orig. (Oct. 14, 1952), approved, 381 U.S. 139	7, 10, 11, 13, 19, 25
332 U.S. 19	11, 17, 24, 28
381 U.S. 139	21
381 U.S. 139	9, 13, 14, 18, 21, 22, 23, 26, 27
United States v. *Florida*:	
420 U.S. 531	22
425 U.S. 791	19, 22
United States v. *Grush*, 26 F. Cas. 48	12
United States v. *Louisiana*:	
340 U.S. 899	21
363 U.S. 1	11
446 U.S. 253	1

Cases—Continued:

	Page
United States v. *Maine*:	
No. 35, Orig. (Aug. 27, 1974)	6, 8
420 U.S. 515	12, 28
United States v. *Texas*:	
339 U.S. 707	13, 28
340 U.S. 900	21
Utah v. *United States*, 394 U.S. 89	2

Treaty and statutes:

Convention on the Territorial Sea and the Contiguous Zone, art. 7, 15 U.S.T. 1609, T.I.A.S. No. 5639	5
Customs Act of July 31, 1789, ch. V, § 1, 1 Stat. 31	13
Submerged Lands Act, 43 U.S.C. 1301 *et seq.*	13
43 U.S.C. 1301(a)(1)	21
43 U.S.C. 1301(a)(2)	21
Ch. 289, 1859 Mass. Acts 640	12
Ch. 810, 1970 Mass. Acts 679	16
Ch. 742, 1971 Mass. Acts 616	15
Ch. 1035, 1971 Mass. Acts 985	15
Ch. 1104, 1971 Mass. Acts 1128	15

Miscellaneous:

J. Angell, *Tide Water* (1826)	7-8
Y. Blum, *Historic Titles in International Law* (1965)	7, 8
44 Fed. Reg. 2245 (1979)	20
T. Fulton, *The Sovereignty of the Sea* (1911)	6
Hale, *De Jure Maris et Brachiorum ejusdem* (1667) *reprinted in* R. Hall, *Essay on the Rights of the Crown and the Privileges of the Subject in the Sea Shores of the Realm* (2d ed. 1875)	9

Miscellaneous—Continued:

	Page
P. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927)	8, 19-20
Letter from James E. Webb, Acting Secretary of State, to U.S. Department of Justice (Nov. 3, 1951), *reprinted in* 1 A. Shalowitz, *Shore and Sea Boundaries* (1962)	14, 19
1 J. Moore, *Digest of International Law* (1906)	19
1 Op. Att'y Gen. 32 (1793)	13
Pearcy, *Measurement of the U.S. Territorial Sea*, 40 Dep't St. Bull. 963 (1959)	20
R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978)	2
4 M. Whiteman, *Digest of International Law* (1965)	20

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 35, Original

UNITED STATES, PLAINTIFF

v.

STATE OF MAINE, ET AL.

(MASSACHUSETTS BOUNDARY CASE)

ON THE REPORT OF SPECIAL MASTER

REPLY BRIEF FOR THE UNITED STATES

INTRODUCTION AND SUMMARY OF ARGUMENT

In light of our acquiescence in the Special Master's recommendation that Vineyard Sound be declared part of the inland waters of Massachusetts,[1] the only issue now before the Court is whether the waters of Nantucket Sound also qualify as inland (as the Com-

[1] Misunderstandings as to the basis and the meaning or prior "concessions" by the United States in this case (see Report 19, 20) counsel us to be explicit in stating what motivates our failure to except to the ruling that Vineyard Sound constitutes inland waters. We do not believe the Master's conclusion as to Vineyard Sound was correct; much less do we accept his reasoning. But, as it happens, all of the submerged lands of the Sound belong to the Commonwealth as underlying territorial waters, even under our view that these waters are not inland. The only practical effect of the Master's Vineyard Sound holding is to add a 1,000 acre wedge to Massachusetts submerged lands off the southwest entrance to the Sound. See Appendix, *infra*. Given such a minimal consequence, and the somewhat unique facts bearing on the historical claim to Vineyard Sound—in several respects contrasting with the evidence relating to Nantucket Sound—we have concluded that we ought not burden the Court with this issue. Cf. *United States* v. *Louisiana*, 446 U.S. 253, 261 n.1 (1980).

monwealth asserts) or, rather, constitute territorial sea and high seas (the Master's conclusion, which we support). See Appendix, *infra*. That single question, alas, has spawned a dozen sub-issues and no lack of words, some apparently self-contradictory and many of them wide of the mark as it seems to us.[2] Our endeavor will be to put the case back on track in as short a space as possible.

Had we the courage of our convictions, we would rest with a mere reference to pages 64 and 65 of the Report in which the Special Master unequivocably, and unanswerably, disposes of the Commonwealth's claim to Nantucket Sound by demonstrating that any earlier title to the area has long since lapsed. See pp. 10-17, *infra*. It will be noted that the Master's conclusion there is unhesitating and plainly does not depend on the standard of proof required of Massachusetts—the only matter to which its present brief is addressed.[3]

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[2] Although we disagree with some of the Special Master's reasoning, and even with one or more of what may be termed "conclusory" findings with respect to Nantucket Sound, we have filed no exception. That is because we entirely endorse the result—seeking neither more nor less than the decree recommended by the Master. Even a respondent or appellee in this Court is entitled to defend the judgment below on alternative grounds in such circumstances. See R. Stern & E. Gressman, *Supreme Court Practice* 478-487 (5th ed. 1978). *A fortiori*, a like procedural rule applies in cases on the Original Docket. These are, jurisdictionally, always in this Court and the filing of exceptions from a Special Master's Report is no more than a customary practice, not codified by statute or even by the Court's Rules. The Court has followed this course in the past, entertaining an alternative argument, advanced only by a reply brief, and adopting it to sustain a Special Master's ruling. *Utah* v. *United States*, 394 U.S. 89, 96 (1969).

[3] Massachusetts understandably invokes the Special Master's statement that it can "establish an ancient title to Nantucket Sound only if the Supreme Court holds that the 'clear beyond doubt' standard is inappropriate to this proceeding." Report 51. But it seems plain the quoted passage refers alone to the initial inquiry whether such a title was ever perfected in colonial times. On the critical issue whether any such title survived, the Master was in no doubt. Report 64-65. The Commonwealth simply ignores this unequivocal conclusion as to the "lapse" of any rights acquired during the colonial period. Report 65.

Although caution has led us to submit a fuller, sequential, presentation, we adhere to the view that the swiftest and surest solution to the case lies in the finding that any "ancient title" to Nantucket Sound was promptly renounced by both the United States and the Commonwealth itself.

A. We begin by stressing that the State's claim to Nantucket Sound as inland waters rests solely on the so-called doctrine of "ancient title." In the present context, this requires a showing that the Sound was lawfully acquired by the British Crown in colonial times and that the Commonwealth succeeded to that title and preserved it to this day. At the very least, we are warned to be cautious in accepting a claim so founded by the fact that there is no American precedent for it.

B. Assuming the validity of the theory, the evidence does not support a finding that Nantucket Sound became inland water of Massachusetts in the colonial period. Although it may satisfy the line-of-sight test, the Sound would not have been deemed eligible to be included in "county waters" because it is in no sense an indentation into the mainland, locked "between the jaws of the land." There is, moreover, no satisfactory evidence of "effective occupation" by governmental action.

C. At all events, any colonial title to Nantucket Sound has long since "lapsed," as the Special Master concluded. Indeed, every indication is that, immediately upon independence, the Commonwealth itself renounced the idea that the Sound was part of its internal waters. So, also, it seems clear such a claim would

have been inconsistent with federal standards prevailing at the formation of the Union. In these circumstances, Massachusetts must be deemed to have relinquished any title it still held to the Sound.

D. Alternatively, we demonstrate that, if it did not do so at once, Massachusetts renounced or abandoned its claim to Nantucket Sound more than a century ago. At the latest, this occurred in 1859 when the State legislature formally adopted a six-mile rule to delimit Commonwealth internal waters. That regime having persisted without interruption until 1971, any "nonconforming" title to Nantucket Sound must be considered abandoned and cannot be "rescussitated" so late in the day.

E. Equally dispositive is the consistent repudiation of inland jurisdiction within Nantucket Sound by the United States. This is not a case in which the federal government participated in the ripening of historic title over a long span and then, belatedly and with questionable motives, disclaimed the inland water status of the disputed area. In the present circumstances, the Commonwealth's title to the Sound, even if briefly vested after statehood, may properly be deemed abrogated through longstanding adherence by the Nation to principles that deny inland status for the Sound.

F. Finally, we address the question so fully argued by Massachusetts: the quantum or standard of proof applicable to the State's historic claim in the face of a federal disclaimer. In our view, the result in this case does not remotely depend on the answer to that inquiry. Nevertheless, we submit that the Court and its Special Masters have consistently articulated the rule that the proof must be "clear beyond doubt" in a situation like that presented here. So much is due to the international stance deliberately taken by the United States, which ought not be contradicted except upon very strong evidence that it would be palpably unjust to deprive a

State of clear title matured by past events in which the federal government itself took a hand.

ARGUMENT

A. The Commonwealth's claim to Nantucket Sound is expressly (and necessarily) founded on an alleged colonial title

It is common ground that Nantucket Sound does not qualify as a "juridical" bay, *i.e.*, one that satisfies the presently governing criteria of Article 7 of the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1609, T.I.A.S. No. 5639. Report 9; see *Rhode Island & New York Boundary Case*, No. 35, Orig. (Feb. 19, 1985), slip op. 9-10; *Alabama & Mississippi Boundary Case*, No. 9, Orig. (Feb. 26, 1985), slip op. 6. So, also, there is no suggestion that the Sound is enclosed by a system of "straight baselines" sanctioned by the United States. Report 6; Mass. Exception 11; see *Alabama & Mississippi Boundary Case*, slip op. 6. And, whatever its earlier stance (see Report 10, 25), Massachusetts now expressly states that "it no longer claims historic title" to Nantucket Sound in the familiar sense of that term. Mass. Exception 4, 13 & n.7; see *Alabama & Mississippi Boundary Case*, slip op. 8-9.[4] For better or for worse, the Commonwealth today is perfectly content to rest the inland water status of Nantucket Sound solely on an alleged "ancient title" acquired by the British Crown and later passed on to the State. Mass. Exception 4, 13 & n.7, 23-24.

This is a unique stance. Presumably, Massachusetts recognizes that in the case of Nantucket Sound there is no evidence whatever to support a more traditional claim of "historic inland water" title, gradually maturing

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[4] Nor does Massachusetts in this Court assert that the "history and usage" of Nantucket Sound, as distinguished from the doctrine of "ancient title," supply an independent basis for its claim. See Report 51, 61.

over time through continued exercise of authority by federally sanctioned activities there and the acquiescence of foreign nations. Thus, despite a short-lived attempt to invoke the recent decision in the *Alabama & Mississippi Boundary Case* as relevant (see Report 69-69.4), the Commonwealth's argument in this Court is wholly unrelated to the one that prevailed there. Massachusetts here makes no pretense that, until a decade and a half ago, the State, as a member of the Union, or the United States, took any action with respect to Nantucket Sound that would yield a prescriptive title. Rather, the Commonwealth's entire submission is that a complete and perfect title to the Sound was lawfully acquired by the Crown during colonial times and bequeathed to the State—which could enjoy the inheritance without further ado. There is no precedent in this country for such a claim.[5]

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[5] On the contrary, both here and in England, it has been stated that nothing remains of maritime titles asserted in the 17th and 18th Century. Thus the Englishman Fulton has written that the old English claims survive

> only in the pages of historians, naval writers, and pamphleteers * * * * * [and] without apparently leaving a single juridicial or international right behind.

T. Fulton, *The Sovereignty of the Sea* 21, 538 (1911).

Elihu Root, in his argument for the United States in the North Atlantic Fisheries Arbitration stated that:

> These vague and unfounded claims [of the 18th and 17th, and earlier centuries] disappeared entirely, and there was nothing of them left . . . . The sea became, in general, as free internationally as it was under Roman law.

Quoted in Special Master's Report of Aug. 27, 1974, in No. 35, Orig., O.T. 1973, *United States* v. *Maine*, at 41 (brackets in original; citation omitted). As Judge Maris properly concluded, the coastal

B. No inland water title to the Sound was perfected in colonial times

It is not entirely clear how the Special Master and the Commonwealth overcome the stated requirement under the doctrine of ancient title that "effective occupation" of the area in question must date "from a time prior to the victory of the doctrine of freedom of the seas." Report 25-26; Mass. Exception 4. Although acknowledging the condition, neither the Master nor Massachusetts addresses the historic fact that, except for the relatively brief period of excessive Stuart pretensions, never fully accepted by the world community, freedom of the seas has been the prevailing international law regime since several centuries before the alleged appropriation of Nantucket Sound, especially where British views held sway. See Special Master's Report of Aug. 27, 1974, in No. 35, Orig., O.T. 1973, *United States*

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states may not rely on discredited pretentions of the Stuart reign to support modern coastline claims. Id. at 40-47, 60-65, 76-79.

The point is well summarized in Y. Blum, *Historic Titles in International Law* 250 (1965) (emphasis in original):

> a claim resting solely on extensive medieval pretentions, which may have been valid as long as a different legal regime prevailed over the high seas, will not be deemed as sufficient to uphold maritime historic claims and to validate them in accordance with the law in force at present. When the new international law of the sea took its final shape with the undisputed triumph of the *mare liberum* doctrine, each State was deemed to have been under the obligation, as it were, to *reacquire* its rights beyond those parts of the maritime territory which were conceded by the new regime to form the marginal belt of the coastal State.

It is clear that the English do not base any claim today on such outdated theories. See Special Master's Report of Oct. 14, 1952, in No. 6, Orig., O.T. 1952, *United States* v. *California*, at 18, approved, 381 U.S. 139 (1965); Special Master's Report of Aug. 27, 1974, in *United States* v. *Maine*, at 40-47; English position in the *Anglo-Norwegian Fisheries Case* (1 R. 161); Territorial Waters Orders-in-Council of 1964 U.S. Exh. 98).

v. *Maine*, at 25-29; J. Angell, *Tide Waters* 15-17 (1826).[6] We are nevertheless content to understand the Master and the Commonwealth as describing a title—whether or not properly labelled "ancient"—based on lawful occupation of a "vacant" area, not then appropriated by any nation or exempted from appropriation by international law as the common heritage of the world community. Accordingly, we ask two threshhold questions: (1) Could Nantucket Sound have been lawfully appropriated as inland during the colonial period and (2) assuming it might have, did Great Britain in fact assert sovereignty over the Sound?

1. The answer to the first question depends upon whether Nantucket Sound would have qualified as "county waters" under 17th and 18th Century English law which, in this respect, is assumed to have been consistent with international practice. See Report 27-34. We must respond in the negative. Even accepting the more generous line-of-sight test articulated by Sir Matthew Hale (see Report 45), it seems clear the waters of the Sound would not then have been viewed as *inter fauces terrae*, and therefore inland. See Report 43-50. The reason is not so much the width of the eastern entrance to Nantucket Sound (over nine miles), but the fact that the area, defined, except at the north, entirely by islands most of which no one pretends can be

[6] The most often cited example of seabed ownership under ancient title is the case of the Ceylon pearl banks. *Annakumaru Pillae* v. *Muthupayal*, 27 Indian Law Rept. (Madras) 551 (1903). See, Y Blum, *supra*, at 331. The history of that fishery was traced to the sixth century B.C. P. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* 15 (1927).

assimillated as extensions of the mainland,[7] is in no sense a bay or estuary or gulf whose waters lie sheltered "between the jaws of the land," culminating in mainland headlands. Cf. *Louisiana Boundary Case*, 394 U.S. 11, 62-63 & n.82, 66-72 (1969); *United States* v. *California*, 381 U.S. 139, 170-172 (1965) (Santa Barbara Channel); *Rhode Island & New York Boundary Case*, slip op. 16-21 (Block Island Sound); *United Kingdom* v. *Albania*, 1949 I.C.J. 1, 4 (Corfu Channel).

The Special Master, we submit, was too quick to accept the idea that any area whose water crossings could be spanned by the human eye satisfied the Hale test for "county waters." So far as we are aware, no contemporary English authority condoned such an unbridled notion. Indeed, Hale himself specifies that, to qualify, the area must not only be closed by a line along which "a man may reasonably discerne between shore and shore," but also must be an "arm or branch of the sea, which lies within the *fauces terrae*" (or jaws of the land). Hale, *De Jure Maris et Brachiorum ejusdem* cap. iv (1667), *reprinted in* R. Hall, *Essay on the Rights of the Crown and the Privileges of the Subject in the Sea Shores of the Realm* App. vii (2d ed. 1875) (quoted in Report 45). And, unsurprisingly, all the examples alluded to, British or American, involve very obviously landlocked bodies of water, deeply penetrating into the mainland. That is the situation of the Bristol Channel, and of Delaware, Chesapeake and Buzzards Bays, mentioned

[7] We have treated Monomoy Island, culminating at Monomoy Point, as an extension of the Cape Cod mainland. See Stipulation of Apr. 29-30, 1982, para. 2; Report 77-78. It is also arguable that the chain of the Elizabeth Islands, separating Buzzards Bay and Vineyard Sound, should be treated as a mainland extension. See App., *infra*. But no one has ever suggested such treatment for Nantucket, Martha's Vineyard, or the islands that lie between them.

in the Master's Report. See *id.* at 33-37, 45 & n.21, 59. No case treating as inland any area remotely like Nantucket Sound has been shown.

2. An equally serious obstacle to a claim premised on English Crown title is the failure to show any "effective occupation" of Nantucket Sound. As the Special Master repeatedly stressed, mere eligibility for such treatment under pre-Revolutionary English law is not enough to establish inland water title; and actual assertion of sovereignty must be shown. Report 38, 64-65. The evidence on this score is simply that the local inhabitants of the area in colonial times took full advantage of the natural resources offered by Nantucket Sound—as would any coastal people, whether the adjacent waters were "inland" or not. See Report 52-56.[8] In our view, the Master, although briefly distracted by these entirely private activities (see Report 56-58), was correct in ultimately concluding that Massachusetts had never attempted to establish jurisdiction over Nantucket Sound. Report 64-65. The upshot is that no "ancient title" to the Sound as inland water was ever perfected.

C. No colonial title to the Sound survived independence or the formation of the national Union

At all events, it is perfectly clear that any such title to the Sound, if it existed in colonial times, has not sur-

[8] It ought not be necessary, at this late date, to demonstrate that the use of a maritime area by the coastal inhabitants for fishing and other purposes does not remotely constitute an effective assertion of sovereignty by State or Nation. See, *e.g.*, *Louisiana Boundary Case*, 394 U.S. at 75-76 & n.103; Special Master's Report of July 31, 1974, in No. 9, Orig., O.T. 1974, *Louisiana Boundary Case*, at 13-22, approved, 420 U.S. 529 (1975); *United States* v. *Alaska*, 422 U.S. 185, 190, 197-199, 203 (1975). See also Special Master's Report of Oct. 14, 1952, in *United States* v. *California*, at 39, approved, 381 U.S. 139, 173, 177 (1965).

vived. There is no avoiding the Special Master's unequivocal finding that until the 1970's neither Massachusetts as a State nor the United States ever asserted sovereignty over the center of Nantucket Sound and, indeed, that both Nation and Commonwealth effectively *disclaimed* any such jurisdiction for two centuries, with the consequence that "whatever rights [Massachusetts] may have had over Nantucket Sound during the colonial period lapsed until the Commonwealth's recent attempt to resuscitate them." Report 64-65.

There are several bases for the Master's conclusion that colonial rights with respect to Nantucket Sound, if any, "lapsed" by abandonment or renunciation. The first is that the supposed title never passed to Massachusetts as an independent commonwealth or as a member of the constitutional Union.

1. There is, of course, no inhibition on a *new* sovereign's renouncing a portion of the maritime territory enjoyed by the preceding sovereign. Thus, the United States effectively repudiated the sweeping claims once asserted in the ocean by Spain, Mexico, and Britain. *United States* v. *California*, 332 U.S. 19, 32 (1947). See also *United States* v. *Louisiana*, 363 U.S. 1, 30, 71 (1960); Special Master's Report of Oct. 14, 1952, in No. 6, Orig., O.T. 1954, *United States* v. *California*, at 37-38, approved, 381 U.S. 139, 172-175, 177 (1965). So here, assuming that Great Britain "acquired" Nantucket Sound by occupation during the colonial period, and assuming further that this title was transferred from the Crown to the colony by the Seventeenth Century charters invoked in this case (see Report 27, 38-43), nothing prevented the Commonwealth, upon Independence, from relinquishing the Sound to the community of nations.

Perhaps one ought not *presume* such a retrenchment.

But, in the premises, there are very strong indications that Massachusetts, from the beginning of its independent existence, disclaimed Nantucket Sound. That was apparently the view of Justice Story as early as 1829, applying the so-called "Coke test"—which concededly would not embrace Nantucket Sound as inland (see Report 49)—to define the limit of the Commonwealth's internal waters. *United States* v. *Grush*, 26 F. Cas. 48, 51-52 (C.C.D. Mass. 1829). The stance was, in any event, formally confirmed in the mid-Nineteenth Century by the judicial adoption of a standard that Nantucket Sound could not satisfy (*Commonwealth* v. *Peters* 53 Mass. (12 Met.) 387, 392 (1847), and, shortly thereafter, by the legislative enactment of a six-mile rule likewise excluding the Sound from State internal waters (Ch. 289, 1859 Mass. Acts 640; Mass. Exh. 53). See Report 58-59, 65.[9]

2. Although the Commonwealth's own clear failure to claim Nantucket Sound as inland waters until well after the present litigation was initiated in 1969 is dispositive, we note that any attempt by Massachusetts to maintain a non-prescriptive title to the Sound would fail anyway as contrary to the policy of the United States. It is now well settled that whatever rights a State may have enjoyed in the marginal sea and beyond as an independent nation were surrendered to the United States upon acceding to the Union. *United States* v. *Maine*, 420 U.S. 515, 522-523 (1975); *United*

[9] As the Special Master notes (Report 59), the State legislature re-affirmed the 1859 six-mile rule in 1881 and directed the preparation of charts to depict its application. The resulting charts clearly omitted Nantucket Sound from State inland waters. Report 59, 65. That remained the situation until 1970. See note 13, *infra*.

States v. *Texas*, 339 U.S. 707, 717-718 (1950).[10] Plainly enough, that principle cannot be defeated simply because the area in question, although part of the marginal sea or the high seas under federal law, is labelled "inland water" by the affected State.

This, we submit, is the situation here. Indeed, it seems clear that, at least until the present century, the federal government did not assert inland water status for areas like Nantucket Sound which satisfied neither Lord Coke's county waters test nor the six-mile rule and did not enjoy the exceptionally deep inland penetration of Delaware, Chesapeake and Buzzards Bays and Long Island Sound. See, *e.g.*, *Manchester* v. *Massachusetts*, 139 U.S. 240, 258 (1891); *Louisiana* v. *Mississippi*, 202 U.S. 1, 52 (1906); *Rhode Island & New York Boundary Case*, slip op. 14-15; Customs Act of July 31, 1789, ch. V, § 1, 1 Stat. 31; 1 Op. Att'y Gen. 32 (1793).[11] In sum, we fully endorse the Master's finding that the United States in fact never claimed Nantucket Sound as inland water. Report 62, 64-65.

[10] Of course, by virtue of the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, the United States retroceded some of these rights. But Massachusetts does not—and could not—advance any claim under that statute to the portions of Nantucket Sound more than three miles from land (the central core, in dispute here) since the Sound concededly does not qualify as a "bay" under the Convention on the Territorial Sea which this court has held applicable in delimiting "inland waters" under the Act. See *United States* v. *California*, 381 U.S. at 161-167.

[11] It is, of course, common ground that, from the first, the United States (unlike Britain) followed the more conservative Coke test for delimiting inland waters (Report 45-47), and that Nantucket Sound does not satisfy that standard (Report 49). So, also, it is clear that the eastern entrance to the Sound at all times exceeded six miles in width (Report 49-50 & nn.31 & 32, 65), which, for at least a century, the United States (longer than most nations) considered generally a maximum closing distance for bays. See Special Master's Report of Oct. 14, 1952, in *United States* v. *California*, at

D. Any colonial title to the Sound that survived statehood was later voluntarily renounced or abondoned by the Commonwealth.

We have demonstrated that any colonial title to Nantucket Sound terminated with Independence or, at the latest, upon ratification of the federal Constitution. The result would be no different, however, if that title had been abandoned or repudiated at a somewhat later date.

1. The point hardly requires elaboration as it applies to the Commonwealth's voluntary relinquishment of any inherited colonial title. Just as it could renounce such a claim *immediately* upon achieving independence, Massachusetts might do so later. There is no rule of "now or never" in this matter. Subject only to limitations imposed by international law and to federal acquiescence (after 1789), the Commonwealth was free to alter its maritime boundaries. Thus, as this Court squarely held in *Manchester* v. *Massachusetts*, 139 U.S. at 263-264, the State was not required to adhere to the English "county waters" doctrine, but could adopt, as it did, a more precise six-mile rule in defining its internal waters.[12]

14-21, especially 17. As already noted, the special cases of Delaware and Chesapeake Bays and Long Island Sound were justified by unusual geography, not remotely resembling Nantucket Sound. Indeed, as we observe in a moment (pp. 18-20, *infra*), Nantucket Sound, being a strait connecting two segments of high seas and an area defined largely by islands, would not have qualified as inland water during the regime of the so-called ten-mile rule. See Letter from James E. Webb, Acting Secretary of State, to the U.S. Department of Justice, paras. (c), (e) and (f) (Nov. 3, 1951), *reprinted in* 1 A. Shalowitz, *Shore and Sea Boundaries* 354, 355 (1962).

[12] More recently, the Court has qualified the dictum of *Manchester* insofar as that decision seems to condone any extension of State boundaries to the limits permitted by international law, regardless of a federal objection. *United States* v. *California*, 381 U.S. at 168-169. See also *Louisiana Boundary Case*, 394 U.S. at 72-73; *United States* v. *Alaska*, 422 U.S. at 203; *Alabama & Mississippi Boundary Case*, slip op. 6. But the reasoning underlying the requirement of federal acquiescence for the expansion of State maritime boundaries has no application to a contraction of State waters: such action cannot embarass the United States in its foreign affairs.

We accordingly have an effective renunciation of Nantucket Sound by legislative act in 1859—assuming the independent Commonwealth did not immediately disclaim the Sound. And that explicit disclaimer, continually re-affirmed in official charts, persisted for well over a century. No claim to the Sound as inland was advanced until the enactment of new statutes in 1971. See Chs. 742, 1035 and 1104, 1971 Mass. Acts 616, 985 and 1128; U.S. Exhs. 41, 42 and 76. And see U.S. Exh. 44 (Governor's Proclamation).[13] As the Master indicated (Report 65), after so long a lapse, title to Nantucket could not then be recaptured. Nor is it even suggested that a new prescriptive claim has matured in the few years since 1971, especially in light of the open and formal opposition of the federal government.

2. We have spoken of voluntary "renunciation" or "relinquishment," more or less explicit. On the present record, we might stop here. But it is perhaps well to add that, in the context of maritime boundaries, a loss of sovereignty and property rights can result from abandonment. Long acquiescence in a more restricted line is presumably sufficient in this case as it would be where

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[13] In 1968, the Law of the Sea Panel of the Governor's Conference on Massachusetts' Stake in the Ocean filed its report, recommending that the Commonwealth extend its marine boundaries to make them "coextensive with the United States for international purposes, as defined in the Geneva Convention of 1958 on the Territorial Sea and the Contiguous Zone." U.S. Exh. 73, at 1. The report reflected, without apparent disagreement, the federal understanding that Nantucket Sound would not be included within such an extension. *Id.* at 2.

Some months later, the Massachusetts Attorney General, Elliot Richardson, announced that he had been working on legislation and was:

interstate boundaries are involved. See, *e.g.*, *California* v. *Nevada*, 447 U.S. 125, 131-132 (1980), and cases there cited. *A fortiori*, an "aberrational" claim, at odds with contemporary norms, must be deemed lost if it remains unexercised for a long span.

It is true that "ancient title," so-called, is originally a lawful appropriation, not a usurpation conferring rights by adverse possession of an area appertaining to others, and that such a claim is complete by occupation and does not require time to ripen by prescription. But, of course, ancient title is relied upon only when the claim is inconsistent with modern legal standards; it is, in effect, a non-conforming use, entitled to be "grandfathered" only because it was established before the current "zoning" rules were enacted. Accordingly, an ancient title that offends prevailing international law criteria is susceptible to loss by non-use. Indeed, the United Nations study

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ready to define our seacoast by statute, utilizing the latest techniques of international conventions and embracing roughly 150 additional square miles of Massachusetts Bay as ocean territory under the jurisdiction of the Commonwealth of Massachusetts.

U.S. Exh. 47, at 2. The State Attorney General's office consulted with the federal government, which had no objection to the proposed extension, on the understanding that the standards of the territorial Sea Convention would be followed, with the consequence that Nantucket Sound would not be closed. U.S. Exh. 48, at 2-3.

When, the following year, the State legislature again consulted with the federal government, it was made clear that Nantucket Sound could not be closed. U.S. Exh. 34. The Commission then proposed legislation which conformed to the federal position as it existed then and continues today. See U.S. Exh. 48. An accompanying map plainly shows the interior of Nantucket Sound to be high seas. *Id.* at 9. Finally, by Ch. 810, 1970 Mass. Acts 679, the State's boundaries were extended "seaward to the outer limits of the territorial sea of the United States of America." U.S. Exh. 40, at 2. In light of its history, this legislation presumably makes no claim inconsistent with the federal position denying inland water status to Nantucket Sound.

invoked by the Commonwealth expressly contemplates that an ancient title must be "fortified by long usage" if it is to endure. See Report 25; Mass. Exception 13 n.7 (omitting the adjective "long"). But, as the Master found, the history of Massachusetts with respect to Nantucket Sound reflects no attempt to exercise sovereign rights at least from the dawn of the Nineteenth Century to 1971. See Report 64-65.

E. Any colonial title to the Sound that survived statehood was effectively repudiated by the United States

As we have previously noted (p. 13, *supra*), every indication is that, from the very first, the United States disclaimed inland water title to areas like Nantucket Sound, consistently with our exceptionally conservative policy favoring the maximum freedom of the seas. See *United States* v. *California*, 332 U.S. at 32-33, 34. If that is right, Massachusetts must be taken to have relinquished any earlier title to the Sound upon joining the Union. See pp. 12-13, *supra*. The question we now address arises only in the unlikely event the Court were to conclude—contrary to its Special Master—that a colonial title to Nantucket Sound survived statehood with the acquiescence of the United States and was not then or later effectively renounced or abandoned by the commonwealth itself. On that hypothesis, what would be the result if, after 1789, the United States, rather than the State, repudiated any inland water claim for Nantucket Sound?

1. There is no doubt that the federal government has, in fact, disclaimed title to the Sound as inland. Nor does the repudiation of any such claim begin only in 1971, as the Commonwealth suggests (Mass. Exception 21, 23). The publication since 1971 of official charts excluding Nantucket Sound from inland water status (see Report 13-15) is merely the most recent reflection of a consistent stance dating back almost two centuries. As

the Special Master noted (Report 62, 62-63, 64-65), federal custom statutes enacted in 1789, 1790 and 1799, omitted Nantucket Sound (but not Vineyard Sound) and the significance of that fact was notified to the international community by Attorney General Randolph's 1793 opinion in respect of Delaware Bay. In addition, as we have already noticed (p. 13, *supra*), federal judicial decisions early followed a "county waters" test that excluded Nantucket Sound. Report 45, 47. It remains only to stress that the geographical status of the Sound as a strait, connecting two parts of the open sea (see Report 67), has deprived it of inland water status under undeviating federal policy, openly declared to the world for a century.[14]

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[14] The Special Master here seemed to assume that this position was reserved for straits with a significant amount of international traffic. Report 67. Although there is evidence in this record that Nantucket Sound was used for international shipping (Tr. 1019) that fact is not critical to the federal contention. Except for cul-de-sac situations, the consistent United States position has been to deny inland water status to water bodies formed by the mainland and offshore islands regardless of actual use by foreign vessels. See *United States* v. *California*, 381 U.S. at 171-172.

It may be noted that the International Court of Justice placed little or no emphasis on the volume of international traffic in the Corfu Channel Case, *United States* v. *Albania*, 1949 I.C.J. 1, 4. The majority stated (at 28):

> It may be asked whether the test is to be found in the volume of traffic passing through the Strait or in its greater or lesser importance for international navigation. But in the opinion of the Court the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation.

The Special Master's contrary view, although not identified as such, seems to track Judge Azevedo's dissenting opinion. *Id.* at 106. See Report 66.

At least since Secretary of State Bayard's statement in 1886 (see 1 J. Moore, *Digest of International Law* 718-721 (1906)), the United States has made clear its repudiation of any straight baseline system to enclose a channel that is not merely a dead-end (or "cul de sac") leading to inland waters—even where the offlying islands are less than ten miles from shore and from each other.[15] See Letter from James E. Webb, Acting Secretary of State, to U.S. Department of Justice, paras. (c), (e) and (f) (Nov. 3, 1951), *reprinted in* 1 A. Shalowitz, *Shore and Sea Boundaries* 354, 355-356 (1962). And the federal government has protested when foreign nations sought to treat straits as inland. See Special Master's Report of Oct. 14, 1952, in *United States* v. *California*, at 14-15, 25-26; P. Jessup, *The Law*

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[15] We cannot suppose the Court meant to disagree in recently describing "the publicly stated policy of the United States" since 1903 as one of "enclosing as inland waters those areas between the mainland and offlying islands that were so closely grouped that no entrance exceeded 10 geographical miles." *Alabama & Mississippi Boundary Case*, slip op. 13-14 (footnote omitted). Significantly, the Special Master here did not construe the "10-mile rule" as automatically enclosing Nantucket Sound (Report 69.3 n.1) and Massachusetts has not invoked that supposed "rule" in this Court. The correct reading of the quoted passage, we suggest, is that it envisages a cul-de-sac situation like Mississippi Sound (or Chandeleur and Breton Sounds) (see *Alabama & Mississippi Boundary Case*, slip op. 9, 17, 21), but not geographic straits like Nantucket Sound. Otherwise, it is impossible to explain the Court's rejection of inland water claims in Caillou Bay in Louisiana and Florida Bay in Florida. See *Louisiana Boundary Case*, 420 U.S. 529 (1975); *United States* v. *Florida*, 425 U.S. 791 (1976). At all events, moreover, the result in the case of Mississippi Sound did not rest on mere adherence to a ten-mile rule, but involved specific assertions of jurisdiction over the waters of the Sound by all three branches of the federal government (*Alabama & Mississippi Boundary Case*, slip op. 10-11, 14-15, 15-16 & n.11), implemented by concrete activities (slip op. 9, 11-12). As the Master found, there is nothing remotely comparable in respect of Nantucket Sound.

of Territorial Waters and Maritime Jurisdiction 66 (1927); 4 M. Whiteman, *Digest of International Law* 287 (1965). Obviously enough, this stance excluded Nantucket Sound as inland water. But, in any event, the status of the Sound was made explicit in 1959 when the Geographer of the State Department described the "territorial sea of Martha's Vineyard coalesc[ing] with that of the mainland as well as with that of Nantucket Island," a description wholly inapposite if the Sound was inland water. See Pearcy, *Measurement of the U.S. Territorial Sea*, 40 Dep't St. Bull. 963, 965-966 (1959) (quoted at 4 M. Whiteman, *supra*, at 281). There was thus an unambiguous disclaimer of the Sound long before the recently published charts.[16]

2. The only question, then, is whether such a federal disclaimer, however long and consistently maintained, must be denied effect if it postdates the State's admission to the Union, even if only by a few months, on the ground that this would work an impermissible "contraction of a State's recognized territory" in violation of the constitutional principle embodied in *Pollard* v. *Hagan*,

[16] We are at a loss to understand the import of the Special Master's conclusion that a Coast Guard "inland water line" encompassing Nantucket Sound for less than two years—between July 15, 1977, and April 16, 1979 (see Report 16-17)—"vitiated the United States disclaimer." Report 19. Since the Coast Guard lines were published on the same large scale charts which carried the official territorial sea lines, expressly so labelled, it is doubtful that any foreign government was misled. But, in any event, the withdrawal of the Coast Guard lines, with an explicit acknowledgement of error because they did "not accord with the treaty" (44 Fed. Reg. 2245 (1979), U.S. Exh. 93), effectively re-instated the disclaimer of Nantucket Sound as inland water—a position that has been maintained in every re-issue of the relevant charts for the area. Indeed, with particular reference to Nantucket Sound, the Master ultimately concluded that the United States had never asserted inland water title. Report 64-65.

44 U.S. (3 How.) 212 (1845). See *United States* v. *California*, 381 U.S. at 168; *Louisiana Boundary Case*, 394 U.S. at 73-74, n.97, 77 & n.104; *Alabama & Mississippi Boundary Case*, slip op. 18-19. As we understand it, that is the Commonwealth's contention here. See Mass. Exception 7, 15. We disagree.

There is, in truth, no hard and fast constitutional rule that State title to tidelands and offshore submerged lands, once vested, is indefeasably "frozen." The gloss of *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372-378 (1977), on the *Pollard* doctrine, has no application to the beds and shores of waters that affect the national coastline. That was obviously the view of Congress when it wrote the Submerged Lands Act (see 43 U.S.C. 1301(a)(1) and (2)), and of this Court when it adopted the ambulatory principles of the Convention on the Territorial Sea to delimit State inland waters insofar as they affected the baseline of the territorial sea. *United States* v. *California*, 381 U.S. 139 (1965).[17] The point was expressly confirmed in *Hughes* v. *Washington*, 389 U.S. 290 (1967), upholding the State's loss of tidelands existing at statehood, and, most recently, in *California ex rel. State Lands Commission* v. *United States*, 457 U.S. 273 (1982), which reaffirmed *Hughes* (*id.* at 282-283, 284, 288) and again rejected a State claim that former tidelands were irrevocably vested in the State. *Id.* at 284 n.14. In sum, it is clear that changes in geography, whether natural or artificially caused, effectively can deprive a State of title to the beds and shores of tidal waters that qualified

[17] Even before the second *California* decision in 1965, the Court had envisaged an ambulatory coastline, including bay low-water lines and closing lines that would accord with current geography, not the situation at statehood. See the Decrees entered by the Court in the pre-Submerged Lands Act cases. *United States* v. *California*, 332 U.S. 804, 805 (1947); *United States* v. *Louisiana*, 340 U.S. 899 (1950); *United States* v. *Texas*, 340 U.S. 900 (1950).

as inland on the date of the State's admission to the Union.[18]

Given that permanently or periodically submerged areas that once qualified as bays are not irrevocably vested in the State as a matter of constitutional law, it is not apparent why changes in law should not occasionally work a divestiture to the same extent as a change in geography. Indeed, the recent *California ex rel. State Lands Commission* case indicates that Congress can, by fashioning an accretion rule favorable to the United States, effectively deprive a State of some of its historic tidelands. See 457 U.S. at 283-284, 287. What is more, the Court has applied the Convention as domestic law in denying State claims to inland waters which the United States had conceded under its prior understanding of international law rules. That was true with respect to Caillou Bay in Louisiana (see *Louisiana Boundary Case,* 394 U.S. at 66-67 n.87, 73-74 n.97) and Florida Bay in Florida, anchored in the Keys (see *United States* v. *Florida,* 420 U.S. 531 (1975); 425 U.S. 791 (1976)).

To be sure, the State invokes the caveat in *United States* v. *California,* 381 U.S. at 168, to the effect that the "contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable." But this was written in the context of a ruling that *approved* the wholesale adoption of new international rules as con-

[18] This can occur in many ways: alluvion or accretion within the bay may reduce the water area so that it no longer meets the semi-circle test or loses its character as a "well-marked indentation"; erosion may wear away, or a violent storm may wash away, one or both headlands so that the water is no longer "land-locked" or the closing line exceeds 24 miles; a former headland may become an island, depriving the bay of one of its mainland "arms"; or islands screening the mouth may disappear and lengthen the water crossing to the point where the semi-circle test can no longer be met.

trolling State offshore rights and cannot reasonably be understood to require rejection of any application that, contrary to the usual result, disadvantages a State. Indeed, the point was clarified four years later in the *Louisiana Boundary Case,* 394 U.S. at 74 n.97, where the court said the Federal Government "arguably could not abandon [a consistent official international] stance solely to gain advantage in a lawsuit to the detriment of [a State]." Obviously, this description does not reach any changes in inland water delimitation rules directly resulting from United States adherence to the Convention on the Territorial Sea, which *the Court,* over our objection, imported as the law of these cases. See *United States* v. *California,* 381 U.S. at 164.

Our submission is not that the *Pollard* doctine has no application to tidal waters. But it must be remembered that the *Pollard* case does not tell us which are "inland waters" for constitutional purposes. More recently, the Court has instructed us to measure inland waters on the seacoast in accordance with the international Convention on the Territorial Sea. Yet, the whole rationale for adopting the comprehensive rules of the Convention as the "coastline" law of the Submerged Lands Act would be defeated if each application to a particular segment had to be tested against some supposed prior criteria and rejected if, in that context, the State fared less well. Cf. *California ex rel. State Lands Commission* v. *United States,* 457 U.S. at 286 n.14; *United States* v. *California,* 381 U.S. at 165, 166 n.33. Nor is it merely a matter of avoiding awkward burdens and pretexts for further controversy. This is a situation in which localized State concerns must yield to the broader national policies which inform the choice of a uniform international stance. Here, no less than in the case of coastal tidelands, we deal with "waters that lap both the lands of the State and the boundaries of the international

sea," whose status is "too close to the vital interest of the Nation in its own boundaries to allow it to be governed by any law but the 'supreme Law of the land.'" *Hughes* v. *Washington*, 389 U.S. at 293, reaffirmed in *California ex rel. State Lands Commission* v. *United States*, 457 U.S. at 280, 283, 288. See also, *United States* v. *California*, 332 U.S. at 29, 34-36, 40.

These considerations may by insufficient where a belated and suspect federal disclaimer is invoked to divest a State of a title to inland waters that has already ripened by notorious adverse possession over a long period with the participation of federal authorities. See *Alabama & Mississippi Boundary Case*, slip op. 9-19. But no like case can be made for a title that was not earned by long usage, has never been endorsed by the United States, and, indeed, has been publicly repudiated by the Nation for most of two centuries, well before any dispute over valuable seabed resources was contemplated. Neither law nor equity can insulate the archaic Massachusetts claim to Nantucket Sound.

F. In light of the federal disclaimers, the Commonwealth must establish the original existence of colonial title to Nantucket Sound and its survival to the present day by evidence "clear beyond doubt"

We have already stressed our belief that decision of the only issue remaining in the case depends not at all on the standard of proof required of Massachusetts in establishing the inland water status of Nantucket Sound. This is because the Special Master correctly found that, on the critical question whether any colonial title to the Sound has been preserved, there was a total "absence of evidence showing an assertion of authority over Nantucket Sound during the nineteenth century," but, on the contrary, "positive evidence" (much of it "introduced by Massachusetts") that the Commonwealth "failed to do so." Report 65. Thus, the Master's conclusion that any "ancient title" long since "lapsed" (*ibid.*) does not remotely turn on the quantum or standard of proof properly required of the claimant State. And, since the Commonwealth's case ultimately requires a showing that any ancient title has survived, it cannot matter which standard is applicable to the threshhold question whether such a colonial title was ever perfected. Out of an abundance of caution, we nevertheless briefly address the point to which the whole of Massachusetts' brief is devoted.

1. We fully accept that the question of proving a title "clear beyond doubt" arises only when the United States disclaims the area as inland water. See Mass. Exception 19. However, the 1965 *California* decision which established the standard makes clear that the rigorous burden of proof applies whenever the federal government officially denies the inland status of the disputed waters, even during the lawsuit. That was the situation there, as it was in the *Louisiana* litigation. See *Louisiana Boundary Case*, 394 U.S. at 73-74 & n.97; Special Master's Report of July 31, 1974, in Louisiana Boundary Case at 18-19, 21-22, approved, 420 U.S. at 529.[19] Such a belated disclaimer may not be "effective" or "dispositive" because a previously perfected historic title is "clear beyond doubt" (*e.g.*, *Alabama & Mississippi Boundary Case*, slip op. 18-19), but it nevertheless brings into play the special standard of proof.

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[19] As applied to Caillou Bay, the United States in 1968 and thereafter was disclaiming inland water title to an area that it had expressly asserted to be inland throughout the 1950s (and perhaps earlier). Nevertheless, Louisiana's claim to the area, largely based on historic title, was rejected.

Thus, here, the wholly unambiguous disclaimer of Nantucket Sound on published official charts, beginning at the latest in 1979 after the withdrawal of the Coast Guard lines (see n.16, *supra*), was sufficient to require the Commonwealth to prove its title by evidence "clear beyond doubt." But, as it happens, we need not rely on anything so recent. There were, as we have noted, federal disclaimers of the inland status of the Sound as early as a customs statute of 1789. And that stance never varied. Plainly enough, this history, if not wholly dispositive (see pp. 11-24, *supra*), places the heaviest burden on the Commonwealth to demonstrate a title to Nantucket Sound.

2. Massachusetts apparently accepts that it has the burden of persuasion on the issue of ancient title even in the absence of any federal disclaimer (beyond our litigation stance). See Mass. Exception 9-13. In its view, however, no disclaimer can alter the standard to which it must prove its case. This, we submit, ignores both longstanding precedent and common sense.

Indeed, in the second *California* case, the Court very plainly indicated that a higher degree of proof was required to establish historic inland title when the United States disclaimed the area. 381 U.S. at 175. We read the opinion in the *Louisiana Boundary Case*, 394 U.S. at 76-77, to the same effect. It is obviously useless to look to international law on this point: nations do not normally both claim and disclaim title to the same area at the same time. This is a domestic problem, related to our particular federal system. On the other hand, it is relevant that international law requires an open and notorious claim before recognizing historic inland water title to areas that do not meet the "juridical" tests. Unless the historic evidence of title is very strong indeed, and the belated federal disclaimer can be dismissed as motivated by domestic concerns, it would be

extraordinary to give effect to an ambiguous set of mixed signals.[20]

There is, moreover, a foreign policy concern. It would cause a degree of embarassment for the United States if this Court, at the behest of a State of the Union, were to declare inland a body of water that the United States had repeatedly disclaimed over a long span. That situation is very like the one in which a State is asserting straight baselines which the Nation declines to draw. See *United States* v. *California*, 381 U.S. at 168. Accordingly, it is entirely appropriate for the Court to require very clear evidence of perfected title before it contradicts the public stance of the federal government. Presumably, such a result should be restricted to cases in which the United States long endorsed the inland water claim and has only very recently repudiated it for what may be reasons unrelated to foreign policy. See *Louisiana Boundary Case*, 394 U.S. at 73-74 n.97; *Alabama & Mississippi Boundary Case*, slip op. 19.

3. It remains only to define the heightened standard of proof by which an inland water claim must be decided

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[20] The point is well illustrated by the Court's treatment in *United States* v. *Alaska*, 422 U.S. at 203, of a State seizure of a Japanese vessel in the Shelikof Strait:

> [W]e are not satisfied that the exercise of authority was sufficiently unambiguous to serve as the basis of historic title to inland waters. The adequacy of a claim to historic title, even in a dispute between a State and the United States, is measured primarily as an international, rather than a purely domestic, claim. See *United States* v. *California*, 381 U.S., at 168; *Louisiana Boundary Case*, 394 U.S., at 77. Viewed from the standpoint of the Japanese Government, the import of the incident in the strait is far from clear. Alaska clearly claimed the waters in question as inland waters, but the United States neither supported nor disclaimed the State's position. Given the ambiguity of the Federal Government's position, we cannot agree that the assertion of sovereignty possessed the clarity essential to a claim of historic title over inland waters.

in the face of a federal disclaimer. On this point, we fully endorse the Special Master's discussion (Report 21-24). The Master concluded, as he and his predecessors had in like cases, that the Court in the *California* and *Louisiana* cases had fixed a standard of "clear beyond doubt." He added that the Court's adoption of subsequent Special Master Reports applying that standard has effectively ratified it. Report 24. We read the Court's most recent decision as endorsing the standard once again. *Alabama & Mississippi Boundary Case,* slip op. 18.

There is certainly no ground for concluding that the "clear beyond doubt" standard has proved unworkable. The Court deemed it satisfied as to Mississippi Sound in the *Alabama & Mississippi Boundary Case,* slip op. 19, as did the Master here in respect of Vineyard Sound. In these circumstances, we submit the Commonwealth's invitation to re-examine the matter should be declined. See Mass. Exception 9-19. Stare decisis ought to be accorded special force in this context. *United States* v. *Maine,* 420 U.S. at 527-528. Besides, equal treatment of sovereign States with respect to their offshore submerged lands rights is a constitutional imperative. *Id.* at 520-522; *United States* v. *Texas,* 339 U.S. at 719; *United States* v. *California,* 332 U.S. at 23.

CONCLUSION

The recommendations of the Special Master's Report should be approved by the Court and a decree entered accordingly.

Respectfully submitted.

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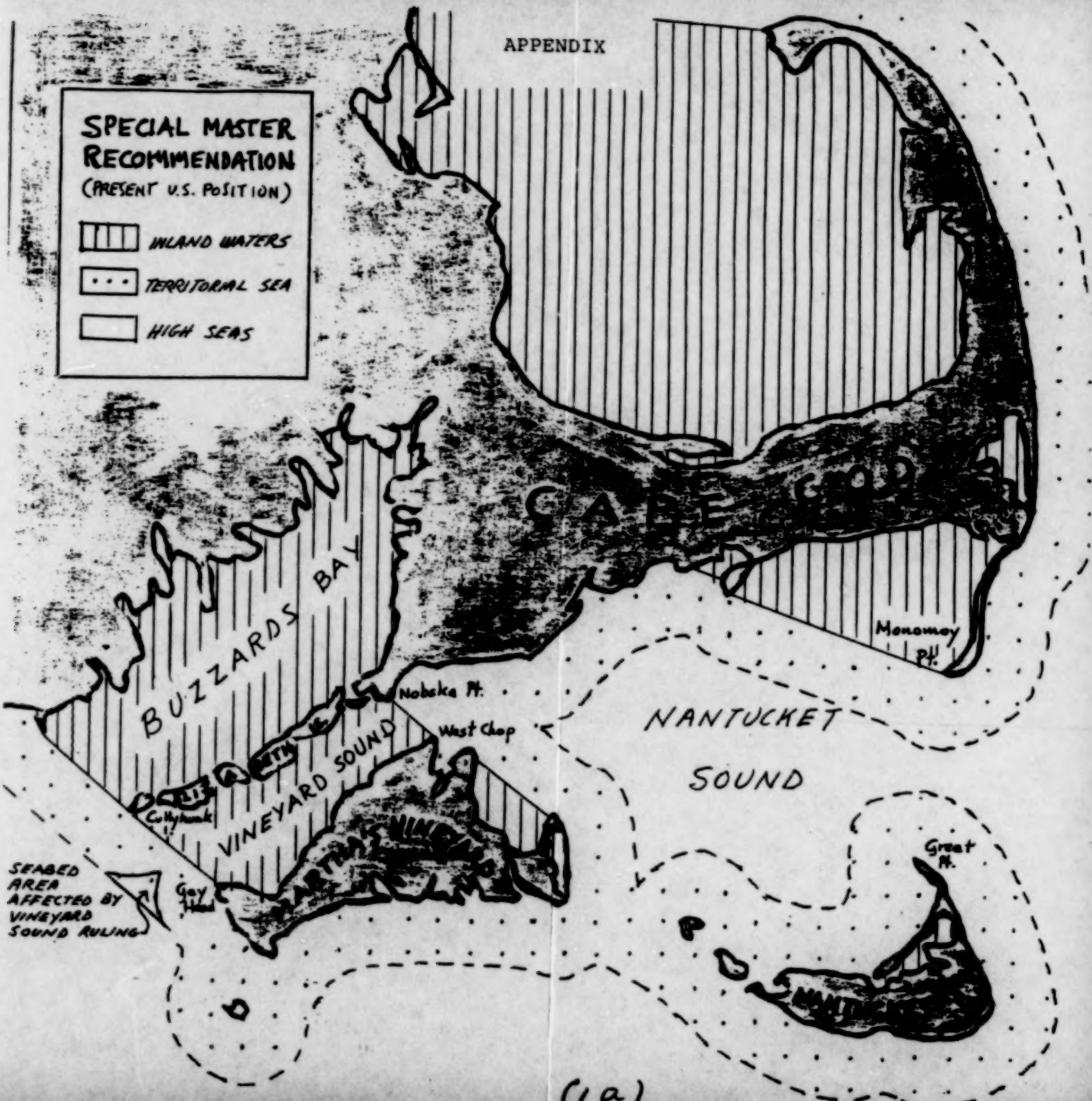
SEPTEMBER 1985


SPECIAL MASTER RECOMMENDATION
(PRESENT U.S. POSITION)
INLAND WATERS
TERRITORIAL SEA
HIGH SEAS
CAPE COD
BUZZARDS BAY
Monomoy Pt.
Nobska Pt.
West Chop
VINEYARD SOUND
NANTUCKET SOUND
Cuttyhunk
Great Pt.
SEABED AREA AFFECTED BY VINEYARD SOUND RULING

Supreme Court, U.S.
FILED
OCT 28 1985
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CLERK

No. 35, Original. (4)

In the

Supreme Court of the United States.

OCTOBER TERM, 1985.

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

STATE OF MAINE, ET AL.,
DEFENDANTS.

(MASSACHUSETTS BOUNDARY CASE)

ON REPORT OF THE SPECIAL MASTER.

Reply Brief of the Commonwealth of Massachusetts.

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Table of Contents.

Introduction 1

I. The validity of the doctrine of ancient title 2

A. Ancient title is a legitimate doctrine for delimiting coastal waters under the Convention 3

B. Ancient title is not contrary to the contemperaneous law of England, or incompatible with freedom of the seas 7

1. Massachusetts' claim is unrelated to the discredited Stuart claims 7

2. The Crown's acquisition of the Sound by discovery and occupation did not contravene the doctrine of freedom of the seas 9

3. Perfected titles to inland waters were not divested by the doctrine of freedom of the seas 12

II. The "threshold questions" raised by the United States 14

A. The applicability of the *inter fauces terrae* doctrine to Nantucket Sound 14

B. There was effective occupation of the Sound 16

III. The allegation of "lapse" resulting in abandonment or relinquishment of a perfected ancient title 19

A. "Passive" abandonment 24

B. The United States' argument of abandonment by affirmative acts since Independence 28

1. Alleged abandonment by the United States 29

2. Allegations that Massachusetts itself disclaimed title to Nantucket Sound 35

3. The record contains evidence contradicting the United States' argument 39

Conclusion 43

Table of Authorities Cited.

Cases.

Commonwealth v. Peters, 53 Mass. (12 Metc.) 387 (1847) 15

Mahler v. Norwich and New York Transp. Co., 35 N.Y. 352 (1866) 5n, 14n, 26, 30

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United States v. California, 381 U.S. 139 (1965) 29, 32

U.S. v. Grush, 26 F.Cas. 15,268 (1829) 14n, 29

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Statutes and Treaties.

Statute 1971, c. 1035 39

Convention on the Territorial Sea and Contiguous Zone, Article 7 2, 4

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Introduction.

The Special Master has found that Massachusetts, as successor to the Crown, has established a claim to a perfected ancient title to Nantucket Sound, subject only to the application of a burden of proof less onerous than "clear beyond doubt." That was, and remains, the essence of our position at this stage of these proceedings.

The United States argues in a somewhat fragmented fashion that no ancient title was perfected and that, if it was, it was abandoned, actively or through inaction. The first portion of our response is devoted to a rebuttal of the United States' attack on the perfection of the title. We then proceed to address what the United States has characterized as "threshold questions." In Part III, we proceed to rebut the United States' attack on the *retention* of our ancient title, once perfected. In essence, our position is that the Master's findings dealing with "lapse" refer not to the retention of a perfected non-prescriptive *ancient* title, but, rather, to the ripening of a claim to a prescriptive *historic* title. The United States, we submit, has confused these totally separate analyses, as it has the evidence it discusses, which has more to do with historic than with ancient title. We argue below that international law requires certain prerequisites for the abandonment of a vested ancient title, and the record in this case does not manifest them.

I. The Validity of the Doctrine of Ancient Title.

Massachusetts asserts that it has an ancient title to Nantucket Sound. The Special Master found the doctrine of ancient title to be valid under international law, and applicable to a "historic bay" determination under Article 7 of the Convention on the Territorial Sea and Contiguous Zone (the "Convention"), pursuant to the analysis in the "Juridical Regime of Historic Waters, Including Historic Bays," [1962] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/142 (1962) (the *Juridical Regime*), a study which the Court has characterized as "authoritative." *See United States* v. *Louisiana (Mississippi Sound Case)*, 105 S.Ct. 1074, 1080 (1985).

The United States neither accepts nor forthrightly rejects the doctrine of ancient title.[1] Instead, it purports to accept the doctrine, as explicated by the Special Master, while sniping at it from footnotes. Nevertheless, the doctrine is a part of international law, and, as the Special Master found, is applicable to Nantucket Sound.

A. *Ancient Title Is a Legitimate Doctrine for Delimiting Coastal Waters Under the Convention.*

The United States implies that there is something vaguely "alien" about the concept of ancient title. *See, e.g.*, Reply Brief at 3 ("We are warned to be cautious in accepting a claim so founded by the fact that there is no American precedent for it"), 6 ("There is no precedent in this country for such a claim"). As the United States has itself pointed out, Reply Brief at 23, and as the Special Master observed, Report at 4-5, this Court has determined that these federal-state seabed con-

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[1] At one point in its Reply Brief, the United States appears to admit the legal validity of the doctrine: "It is true that ancient title, 'so-called', is originally a lawful appropriation, not a usurpation conferring rights by adverse possession of an area appertaining to others, and that such a claim is complete by occupation and does not require time to ripen by prescription." Reply Brief at 16. Further, the United States seems to admit the existence of ancient seabed title with respect to sedentary fisheries. Reply Brief p. 8 n.6.

However, at other places, the United States repeatedly evidences displeasure at the name "ancient" without clearly articulating why. *See* Reply Brief at 3 ("the so-called doctrine of ancient title"), at 8 ("a title — whether or not properly labelled "ancient"), at 16 ("ancient title, so called"). "Ancient" is the term employed by publicists, international tribunals, and by the *Juridical Regime* to denote the doctrine in question. As the United States well knows, the term, as far as territory is concerned, has no necessary reference to ancient or classical civilizations. It merely signifies that the title was perfected prior to the particular territory becoming subject to the doctrine of freedom of the seas. *Juridical Regime*, ¶ 71. Since everyone knows what is meant, the United States' apparent objection to the term "ancient" seems a sterile quibble.

troversies are to be resolved by reference to the Convention. It is undisputed that the Convention provides for "historic bays" in Article 7(6). What constitutes the basis for "historic bays" (undefined in the Convention) has been repeatedly evaluated by this Court by recourse to the *Juridical Regime*. The *Juridical Regime* identifies both "historic" and "ancient" title as a basis for historic bays treatment. Accordingly, "ancient" title is no more alien than "historic" title. The Court's adoption of this area of international law renders it, despite the United States' misgivings, the law of this country.

This also disposes of the United States' argument, Reply Brief at 16, that "ancient title is relied upon only when the claim is inconsistent with modern legal standards." Once an ancient title is perfected, according to the legal standards then prevailing,[2] it is *entirely* consistent with modern legal standards, since the applicable provision of the "modern" Convention, construed in light of the *Juridical Regime*, identifies ancient title as one basis for historic bays treatment. The United States' argument is, therefore, simply illogical.[3]

Aside from the United States' complaint that there is no "American" precedent for ancient title, the United States also implies that Massachusetts is wrong in resting its claim on a title established as far back as colonial times.[4]

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[2] Under the doctrine of "inter-temporal law," where the rights of parties are dependent on events or treaties of considerable distance in time, "It can now be regarded as an established principle of international law that in such cases the situation in question must be appraised, and the treaty interpreted, in the light of the rules of international law as they existed at the time, and not as they exist today." Fitzmaurice, 30 B.Y.I.C. 5 (1953).

[3] The United States' analogy to grandfathered non-conforming uses betrays the same fallacy. Further, "uses," not "titles," are "grandfathered." It is of the essence of our argument, of course, that an ancient title was previously *perfected*. Thus, the United States' analogy to zoning law is mistaken.

[4] *See, e.g.*, Reply Brief at 24 (reference to "the archaic Massachusetts claim").

The response is simple: since ancient title cannot vest subsequent to the establishment of the regime of freedom of the seas (*Juridical Regime* ¶ 71), an ancient title, by its nature, must have been perfected a long time ago. The age of the claim does not justify distrust, for, as Brownlie has said, "Even in the case of the acquisition of territory belonging to no state (*terra nullius*), while this may not occur currently, the relevance and existence of such occupation in the past are often issues in existing disputes. *Legally relevant events may have occurred centuries ago.*" Brownlie, *Principles of Public International Law* 103 (2d ed. 1973) (emphasis added).

Finally, the United States expresses dismay at the concept that "a complete and perfect title to the Sound was lawfully acquired by the Crown during colonial times and bequeathed to the State — which could enjoy the inheritance without further ado." Reply Brief at 6. Putting aside the rhetorical use of the terms "bequeathed" and "inheritance," that is indeed the case. It is well settled that whatever territory the British sovereign possessed at Independence was ceded by virtue of the Treaty of Paris in 1783.[5] In 1856, the Secretary of State forcefully expressed the matter as follows:

> The United States regard it as an established principle of international law and of international right, that when a European Colony in America becomes independent, it succeeds to the territorial limits of the Colony as it stood in the hands of the parent country. That is the doctrine which Great Britain and the United States concurred in adopting in the negotiations of Paris, which terminated this country's War of Independence. . . . No other principle is legitimate, reasonable, or just.

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[5] See *Manchester* v. *Massachusetts*, 139 U.S. 240, 256-257 (1891); *Mahler* v. *Norwich and New York Transp. Co.*, 35 N.Y. 352, 355 (1866).

1C. Hyde, International Law, § 151(c) at 508. Therefore, if the title was perfected, and if the territory in question was inland waters,[6] then it did indeed belong to Massachusetts "without further ado."

There is no doubt about the international legal status of the Northeastern American coast at the time of discovery. That territory was *res nullius*, and capable of possession by discovery, fortified by occupation. This Court in *Martin* v. *Waddell*, 41 U.S. 367 (1842), ruled that "The English possessions in America were not claimed by right of conquest but by right of discovery." *Id.* at 409. It is clear that title by discovery could only be obtained with respect to *res nullius*: while one can "discover" another sovereign's territory, that does not yield a title thereto.

The Master found that the two royal charters in question *did* encompass Vineyard and Nantucket Sounds. Report at 38-43. That finding was amply justified. Indeed, this Court ruled that Buzzards Bay (adjacent to Vineyard Sound) was granted to Massachusetts by means of its colonial charter. *Manchester* v. *Massachusetts*, 139 U.S. 240, 256 (1891). Since royal title to Buzzards Bay *must* have been acquired by

[6] The title to the seabed of inland water belongs, constitutionally, to the several states, and not the federal government. *Pollard* v. *Hagan*, 44 U.S. (3 How.) 212 (1845). The United States argues that *Pollard* "does not tell us which are 'inland waters' for constitutional purposes." Reply Brief at 23. While that standard is provided, in this context, by the Convention, it seems clear that according to *Pollard*, the determination of "inland status" of necessity results in the vesting of seabed title in the contiguous State of the Union.

In this connection, the United States makes the circular argument that the surrender of the states' rights in the marginal sea to the United States upon acceding to the Union, cannot be defeated by labelling as "inland" waters which are "part of the marginal sea or the high seas under federal law." Reply Brief at 12-13. We might respond that the United States' labelling of the Sound as marginal sea should not be permitted to contract Massachusetts' territory. In the end, neither contention is likely to assist in the task before this Court, namely, to determine whether the area in controversy is "inland."

discovery and subsequent occupation and the application of the line of sight test (the only British method for delimiting waters within the realm at the time), it is hard to explain (and the United States has not tried) why the Crown should not have acquired Nantucket Sound by like means and passed it to Massachusetts by the same legal and political instrument.[7]

B. *Ancient Title Is Not Contrary to the Contemporaneous Law of England, Or Incompatible with Freedom of the Seas.*

1. Massachusetts' Claim Is Unrelated to the Discredited Stuart Claims.

In a lengthy footnote early in its brief, the United States once again seeks to create the impression that the doctrine of ancient title was and is incompatible with English law. Reply Brief at 6-7 n.5.[8] This matter was extensively briefed to the Special Master, and he found against the United States after a careful discussion. Report at 27-37. But the United States repeats the same argument, and cites the same authorities out of context.

The United States asserts that "nothing remains of maritime titles asserted in the 17th and 18th Century." Reply Brief at 6

[7] See also *Manchester*, 139 U.S. at 256-257. There is no serious question that "straits" were capable of expropriation by the coastal state. *See* Opinion of the Attorney General, 1 Op. Atty. Gen. 32 (1793) discussed in Report at 35-38. Indeed, in an earlier stage of this case, the United States argued that the colonial charters granted "rights to the Mainland (*including inland waters such as bays, gulfs and inlets*)." Post Trial Brief for the United States before the Hon. Albert B. Maris, Special Master, *United States* v. *Maine, et al.*, at 123 (emphasis added). In this phase of the case, the United States has argued the contrary, but the Special Master rejected the argument, with good reason. Report at 42.

[8] Although we shall discuss this footnote at length, we note at the outset that the United States resorted to the identical tactic before the Special Master. *See* Report at 26.

n.5. In itself improbable — for the United States can hardly intend to repudiate the historical basis of title to Long Island Sound, Delaware Bay, and Chesapeake Bay — this assertion is unsupported by the authorities cited.

What Messrs. Root and Fulton refer to in the passages selected by the United States are the grandiose medieval claims to broad areas of open ocean (such as, for example, the British claim to all of the English Channel, or the now long discarded Stuart claim to huge ocean areas). *See, e.g.*, Fulton, The Sovereignty of the Sea (1911), frontispiece, ("the 'British Seas,' according to Selden") (Mass. Ex. 155). They were clearly not referring to waters *inter fauces terrae*. For example, as the United States well knows, Fulton plainly states that the doctrine of county waters within headlands was still a vital principle of British law at the end of the Nineteenth Century. *See* Fulton at 593. *See also id.* at 547, *quoted in* Report at 31.

Similarly, the United States repeats its argument that Judge Maris in his 1974 Report in this case concluded that the states "may not rely on discredited pretensions of the Stuart reign." Reply Brief at 6-7 n.5. Massachusetts does not rely on those pretensions. Rather, as the Special Master found, "the county waters doctrine on which Massachusetts relies both predated and survived the Stuart period and remained viable in both English and American legal doctrine well into the nineteenth century." Report at 37. Although the United States has repeatedly sought to tar Massachusetts' title with this brush, it has never attempted by legal or historical analysis to demonstrate a connection between the *inter fauces terrae* principle and the Stuart claims. Indeed, the United States has trenchantly argued the opposite view before this Court in this very case:

> during the period of the so-called "older legal tradition" English law denied the concept of property ownership of the adjacent seas or the seabed. On the other hand, English law has traditionally provided that the common law holds jurisdiction over the arms of the sea where a man could see to the far shore. . . . Those waters have always been viewed as within the boundaries of counties, where, for example a coroner could by virtue of his common law jurisdiction investigate a death on a ship — which he could not do if the ship were on the high seas. . . . English law has always recognized the rights of the Crown in these waters both for purposes of fishing and navigation and in a property sense. The crown could and did grant rights to the sea and subsoil within such bays and inlets.

United States v. *Maine, et al.*, Reply Brief of the United States before the Honorable Albert B. Maris, Special Master, at 17-18 (citations omitted), *cited in* Report at 30 n.9.

2. The Crown's Acquisition of the Sound by Discovery and Occupation did Not Contravene the Doctrine of Freedom of the Seas.

The United States asserts that neither Massachusetts nor the Special Master "addresses the historic fact that, except for the relatively brief period of excessive Stuart pretensions," freedom of the seas has been the prevailing international law regime since several centuries before the alleged appropriation of Nantucket Sound. . . ." Reply Brief at 7. Massachusetts not only addressed this allegation, but briefed the Special Master in detail, from which we excerpt the following:

> The crucial factor, therefore, in evaluating whether the evidence marshalled by Massachusetts

supports a claim to "ancient title" within the meaning of the special category discussed in paragraph 71 of the U.N. Study is whether Massachusetts' title antedates the freedom of the seas regime. To establish that it does, we provide the following summary of the chronological development of the freedom of the seas regime:

> The modern law governing the high seas has its foundation in the rule that the high seas are not open to acquisition by occupation on the part of states individually or collectively: it is *res extra commercium*. Historically the emergence of the rule is associated with the rise to dominance of maritime powers and the decline of the influence of states which had favored closed seas. . . . After 1609 Stuart policies extended the principle of closed seas from Scotland to England and Ireland, and the political concept of the 'British Seas' appeared. The areas claimed extended to the opposite shores of the Continent. The seventeenth century marked the heyday of the *mare clausum* (closed sea) with claims by England, Denmark, Spain, Portugal, Genoa, Tuscany, the Papacy, Turkey, and Venice.
>
> In the eighteenth century the position changed completely. Dutch policies had favored freedom of navigation and fishing in the previous century, and the great publicist Grotius had written against the Portuguese monopoly of navigation and commerce in the East Indies. After the accession of William of Orange to the English throne in 1689 English disputes with Holland over fisheries ceased. However, sovereignty of the sea was still asserted against France, and in general the formal

> requirement of the salute to the flag was maintained. By the eighteenth century the claim to sovereignty was obsolete and the requirement of the flag ceremony was ended in 1805. . . .

Brownlie, *Principles of Public International Law* (2d ed. 1973).

Massachusetts' position on this issue, it might be added, is squarely in accord with that of Blum, who is quoted at length in the United States' Reply Brief at 7, n.5, and who, as the Special Master noted, was the *only* source cited by the United States in opposition to the ancient title doctrine. Report at 26. What the United States has failed to point out to the Master or to the Court is that Blum himself states that the doctrine of freedom of the seas became a generally accepted principle of international law only in the *first half of the nineteenth century*. Y. Blum, Historic Titles in International Law 242 (1965).[9]

To conclude this part of the discussion we point out as we did to the Special Master that

> Under English law, geographically circumscribed coastal bodies of water have always been considered apart from the open sea as far as the jurisdiction and prerogatives of the Crown were concerned. Even at

[9] In § 61 (entitled: "The impact of the principle of the freedom of the high seas on the formation of maritime historic rights"), Blum states,

> Whatever the reason for their divergence of opinion as to the precise legal status of the high seas, it is an undeniable fact that, since the days of Grotius, the principle of freedom of the high seas formed an ever wider currency and that, after a gradual evolution, it gained the upper hand towards the beginning of the nineteenth century, when it crystallized into a universally accepted principle of international law.

> the height of the doctrinal and political battle over the freedom of the seas in the 17th Century (with Selden's *Mare Clausum*, stating the case for England, and *Grotius' Mare Liberium* for Holland) the advocates of freedom of the seas readily conceded that such principle does not apply to coastal waters: "The issue does not concern a gulf or a strait in this ocean, nor even all the expanse of sea which is visible from the shore." *Grotius' Mare Liberum* (Magoffin edition 1216) 37.

Post-Trial Memorandum for the Commonwealth at 40-41.

3. Perfected Titles to Inland Waters Were Not Divested By the Doctrine of Freedom of the Seas.

The United States quotes Blum at length to support an assertion that because of freedom of the seas, ancient title doctrine cannot form the basis for a present claim of title. Reply Brief at 7 n.5. See also Report at 26. Our first point is that is not what Blum *says*; this statement has been quoted out of context. Immediately preceding the passage quoted, Blum refers to "immemorial possession," which he explains as meaning that "the origins of the claimant State's pretensions to the territory in question cannot be traced." Blum at 250. We have not relied on the vague concept of "immemorial possession" (a concept which the *Juridical Regime* at ¶¶ 66, 104 deprecates). Rather, the "origins" of our claim can be established with great specificity: *discovery* (by Peter Gosnold in 1602)[10] followed by *occupation* (*see* Report 51-58) and *political assertion* by means of the Royal Charters (Report at 38-43).

[10] *See also Martin* v. *Waddell*, 41 U.S. at 409: "The English possessions in America were not claimed by right of conquest but by right of discovery."

Second, while it is not quite clear what Blum had in mind when he referred to "extensive medieval pretensions," he clearly could not have been referring to the county waters doctrine, which was alive and well in the later Victorian era (*see* Fulton at 547, *discussed* in Report at 31-32), and survived into the twentieth century. (Fulton published in 1911 and he does not report any change in the law). Blum might have been referring to the early British claims to vast expanses of open sea, including the English Channel up to the French coastline. Those claims, however, have no kinship with the county waters doctrine.

Finally, it must be said that Blum's position there expressed as to the need to "reacquire" maritime territory after the beginning of the eighteenth century is an isolated, even unsubstantiated viewpoint in international law.[11] Indeed, in the next section of his work, concerning "Manifestation of State authority over Maritime Areas," Blum cites Attorney General Randolph's opinion concerning Delaware Bay as an example of an assertion of sovereign authority. *Id.* at 259. That opinion was based on events dating "from the establishment of the British provinces . . . ." And yet, under Professor Blum's theory, if he had applied it (as he did not) to this historic title, the United States would have had to "reacquire" its title *de novo*, with the acquiescence of foreign nations, *after* the date of the opinion in 1793, given Blum's viewpoint as to the operative date of freedom of the seas. In short, Blum's position is conceptual and practical nonsense.

[11] For instance, Blum cites not a *single* authority in the discussion from which the United States quotes. *See* Blum at 248-250.

II. The "Threshold Questions" Raised by the United States.

A. *The Applicability of the* Inter Fauces Terrae *Doctrine to Nantucket Sound.*

Disagreeing with the Special Master (who allegedly was "too quick" in accepting the Massachusetts position), the United States argues that the waters of Nantucket Sound would not have qualified as *inter fauces terrae*, and, therefore inland, during the colonial period. Allegedly, Nantucket Sound does not qualify because it "is in no sense a bay[12] or estuary or gulf whose waters lie sheltered 'between the jaws of the land,' culminating in mainland headlands." Reply Brief at 9. But this argument is insufficient, because it assumes what is still to be proven, namely that county waters must lie between mainland headlands. (Obviously, two of the Nantucket Sound headlands are indeed on the mainland).

The argument, further, is based upon a too literal translation of a medieval Latin metaphor. The colorful expression "within the jaws of the land" has never been given so literal a meaning as the United States invites the Court to do. Rather, it has been understood as, pure and simple, a headlands theory: the "fauces" are headlands, and there is no requirement they be on the mainland.[13]

[12] Massachusetts, incidentally, introduced uncontradicted expert testimony and documentary evidence that an older use of the word "bay" was a generic term including "sounds." See Tr. at 962-969. *See also Burrill's Collection of Definitions of Toponymics Generics*, Mass. Ex. 22, quoting *Topographic Terms in Virginia*, an influential geographic lexicon of the federal period defining a "bay" inter alia, as a "sound."

[13] See, for example, the description in *Mahler*, 35 N.Y. at 355-356, of the small islands at the eastern entrance of Long Island Sound (not Long Island itself) constituting the "fauces terrae" of the Sound. *See also U.S.* v. *Grush*, 26 F.Cas. 15,268 at 52 (1829) referring to the islands fringing Boston Harbor as the *fauces terrae*.

The word "land" has been used indiscriminately in the singular and plural to refer to the same geographic phenomena. The first expression of the rule in 1308, Report at 44, refers to sight "from one land to the other." In *Commonwealth* v. *Peters*, 53 Mass. (12 Metc.) 387, 392 (1847), the word is in the plural: "between lands not so wide but that . . . ." In the *Anglo-Norwegian Fisheries Case*, the court referred to the waters in question as being "*inter fauces terrarum*" since they were enclosable by lines drawn from headland to headland on innumerable islands off the coast. [1951] I.C.J. Reports 116, 130.[14]

Lest the United States now argue that the Latin plural "terrarum" is applicable *only* to islands and not to mainland headlands, it must be noted that the International Law Commission, in its 1956 codification proposal, after considerable study, proposed that Article 13 provide: "If a river flows directly into the sea, the territorial sea shall be measured from a line drawn *inter fauces terrarum* across the mouth of the river." The Commission noted that it had taken the Latin term from the *Anglo-Norwegian Fisheries Case*. See 4 M. Whiteman, Digest of International Law, 339-340 (1965). The headlands of a river mouth, although clearly mainland, thus can be designated as "terrae" or "terrarum." In sum, the *fauces* (headlands) may be

[14] The International Law Commission has summarized as follows the Court's use of the term *inter fauces terrarum*:

> [T]he Latin expression inter fauces terrarum . . . was used by the International Court of Justice in the Fisheries case in the following context. The question was whether Norway could draw straight lines only across bays or also between islands, islets and rocks, across the sea areas separating them, even when such areas did not fall within the conception of a bay. In the Court's view it was sufficient that the areas of sea across which the straight lines were drawn should be situated between the island formations concerned, inter fauces terrarum. [1951] I.C.J. Reports at 130.

on the mainland or on islands. If the distance between them meets the line of sight test, then any arm of the sea[15] within the *fauces* is inland.

B. *There Was Effective Occupation of the Sound.*

The United States further argues that no ancient title was ever perfected because of the alleged failure to show any effective occupation of Nantucket Sound. Reply Brief at 10. The United States seems to suggest that the Special Master found in its favor on this issue. In fact, he unequivocally ruled against the United States: "The Special Master therefore concludes that Massachusetts has introduced sufficient evidence to support a finding that the nature and extent of the colonists' exploitation of the marine resources of the sounds was equivalent to a formal assumption of sovereignty over them." Report at 58.[16]

The United States suggests that, in making this finding, the Special Master was "briefly distracted" by what it considers irrelevant evidence. Reply Brief at 10. However, the finding followed the Special Master's exhaustive analysis of the truly voluminous evidence on this issue. Report at 51-58.

The United States argues that the colonists' exploitation of the Sound cannot, in and of itself, constitute a basis for a historic (prescriptive) title. The question, however, is not

[15] The argument by the United States is also intertwined with its repeated (and unsuccessful) argument that the term "arm of the sea" does not encompass "sounds" or "straits," but this position was rejected by the Special Master based on ample evidence introduced by Massachusetts. Report at 43 n.19.

[16] It is noteworthy that the Special Master found that the colonists' occupation of the Sound could also form the basis of an historic title claim. See Report at 27. The United States confuses the Special Master's discussion of why that factor does not suffice at present for a *historic* title claim, Report at 64-66, with his discussion of whether there had been a perfected *ancient* title claim. Report at 27-51. This crucial distinction, and the United States' attempt to blur it, is discussed at length below.

whether the colonists' activities qualify as prescriptive acts, but whether an ancient title was perfected prior to Independence. The physical and political acts considered in that context have nothing to do with prescription *in any sense*, but fortify a title first obtained by discovery over what was once *res nullius*.

The Special Master's conclusion correctly followed international law. In the correct (nonprescriptive) context, the colonists' exploitation of the entire Sound was not "entirely private activities" as the United States claims. Rather, such intensive and exclusive exploitation of a geographically distinctive marine area surrounded by contiguous land masses under the undisputed political and military control of one sovereign must be considered together with the undisputed fact of initial claim by discovery, coupled with political assertion of ownership and jurisdiction (the colonial charters) and a juridical regime which would enclose those waters (the *inter fauces terrae* doctrine). This well documented matrix of historical factors amply satisfies, we submit, the accepted international law intention that factors of occupation cannot be evaluated individually and in isolation (as the United States suggests) but, rather, must be considered in view of all the circumstances.[17]

There is a further reason why the United States errs in criticizing the Special Master for relying on alleged "entirely private activities." However those acts would be classified today, in their historical context, it is an error to characterize them as wholly private. In the *Rann of Kutch Award* (India and Pakistan) (1968),[18] a boundary dispute concerning a dry

[17] It should also be noted that the issue whether there was occupation sufficient to perfect the ancient title must be determined in light of the legal tests accepted at that time. The older view favored precisely the factors Massachusetts has adduced: "The older works on international law give the nineteenth century view of occupation in terms of settlement and close physical possession." Brownlie at 144.

[18] International Legal Materials, Vol. VII, pp. 633, 673-675.

lake bed, a tribunal of eminent international law experts "remarked that in an agricultural and traditional economy, the distinction between state and private interests was not to be established with the firmness to be expected in a modern industrial economy. In an agricultural economy grazing and other economic activities by private land holders may provide evidence of [national] title." Brownlie at 146 (footnote omitted).

The pertinent discussion in the *Rann of Kutch Award* focused on the commingling of the direct proprietary interest of the sovereign in the means of economic subsistence with the sovereign's political governmental character. In other words, the decision recognized a fusion of the political and proprietary capacity of the sovereign in a primitive economy, which is not found in a modern free enterprise state. This analysis is plainly applicable to the evidence of the colonial history of the Sound. The first factor is the existence of the *proprietary* form of government in the first stages of colonization, with an interesting late survival of that form on Nantucket. See Tr. 1083-1084 (Dr. Louis DeVorsey). *See also* Massachusetts Exhibit 98. Second, at the time, there was unanimity that sovereignty over coastal waters such as sounds was *proprietary* rather than merely jurisdictional. "No matter how it was philosophically established, the view was universally held in 1700 that every coastal state had a natural right to property in the sea as far as it effectively occupied it." 1 D.P. O'Connell The International Law of the Sea 13 (1982). The occupation of the Sound, which the colonists exploited intensively and exclusively as a means of economic survival, see Report at 51-58, was therefore a matter of a permitted exploitation of the sovereign property for a joint benefit (just as in the *Rann of Kutch*). *See, e.g.*, Massachusetts Exhibit 79 (early legislation referring to sedentary fisheries as the "*property*" of the colony and its subdivisions).[19]

[19] This evidence, we submit, is especially significant since sedentary fisheries, as the United States admits, are an established means of gaining ancient title

Considered in isolation therefore (and we have explained above why they should not be), the economic activities which the United States singles out might, with some justification, be termed "entirely private activities" in a modern sense with regard to the elements of a *prescriptive* title. In the relevant historical and legal context, however, that is an incorrect characterization. The Special Master was justified in finding that an ancient title had been perfected, based upon contemporaneous legal standards, prior to independence.

III. The Allegation of "Lapse" Resulting in Abandonment or Relinquishment of a Perfected Ancient Title.

The United States says that the Special Master found that "any earlier title to the area has long since lapsed." The Special Master made no such finding. Rather he found (and Massachusetts has not excepted thereto) that the alternative claim to historic title had lapsed. *See* Report at 64-66. The distinction is absolutely crucial, and the United States has attempted to blur it with a verbal sleight of hand.

The Special Master correctly pointed out that

> Massachusetts argues that its claim to the two sounds rests on two independent and alternative bases: (1) historic title and (2) ancient title.

Report at 25. He first analyzed the "validity of the distinction between historic title and ancient title" and found the distinction

to a seabed. Reply Brief at 8 n.6, citing the case of the Ceylon pearl banks. *See, generally,* Fulton at 612 (concerning acquisition of title by exploiting sedentary fisheries). When this recognized special circumstance of acquisition even in the open ocean is conjoined with the special geographic circumstances of these Sounds, the element of sedentary fisheries has particular importance.

valid in International Law. Report at 24-27. He then analyzed each of Massachusetts' arguments. The first of these was that "it [Massachusetts] is the successor in interest to the perfected title of the Crown." The Special Master correctly identified this as "a claim of ancient title, although it would also support a claim of historic title." Report at 27. This sentence is the key to the scheme of his bifurcated discussion. On pages 27-51 of the Report, the Special Master discusses the elements of a successful claim to ancient title. He finds that if it constituted "county waters" (waters *inter fauces terrae*) Nantucket Sound was granted to Massachusetts by the Crown, which had a proprietary interest in its seabed. Report at 43. Whether the Sound was county waters depended in turn, on the "eyesight test" as formulated by Lord Hale. *Id*. at 46-47. On this final factual issue, the Special Master concluded, on the basis of contemporaneous evidence, "that Nantucket Sound meets the line of sight test of Lord Hale and would have been considered waters *inter fauces terrae* before the Revolution." *Id*. at 51. He went on to state that he could not make the same finding under the "clear beyond doubt standard." Therefore, Massachusetts can prevail only if this extraordinary evidentiary standard is found inapplicable. *Id*. at 51.

The United States concedes, Reply Brief at 2-3 n.3, that what the Special Master was determining, in the Report at 51, was not whether Massachusetts *would have been* entitled to *claim* an ancient title at the time of the Revolution, but, rather, whether such an ancient title had already been perfected *at that time*. But the United States goes on to say that "On the critical issue whether any such title survived the Master was in no doubt. Report 64-65." Those two pages of the Report, particularly the last part thereof, are repeatedly cited and quoted by the United States. *See* Reply Brief at 3, 13, 15, 17, 20. The United States alleges that in this passage, the Special Master found that Massachusetts' ancient title has lapsed by

abandonment or relinquishment. The United States has, however, studiously excluded from consideration or citation the concluding sentence of that section: "The Special Master therefore concludes that Massachusetts has failed to meet its burden of establishing *historic title* to Nantucket Sound." Report at 65-66 (emphasis added). After the care with which the Master distinguished "ancient" from "historic" title, *see* Report at 25, 27, it is absurd to imply that he utilized the latter term to include the former in his summary of the "lapse" discussion.

It is clear, therefore, that the Special Master discussed "lapse" only with respect to the assertion of a *historic* title claim. As we have previously pointed out, the Master had correctly stated that the factual evidence supporting ancient title could also serve as the basis for a historic title claim. Report at 27. Therefore, what the Master dealt with in the Report at 64-66 was whether there was sufficient continuity between the colonial factual basis for ancient title and the subsequent post-colonial events to permit the acquisition of a *historic* title by prescription. He found in the negative on that alternate theory, with no finding that previously *perfected* titles had been abandoned. In so doing, he was in conformance with the well settled rule in International Law governing this distinction, which has been best summarized by a distinguished British scholar and legal advisor to the Foreign Office.

> [The principle of continuity] has two aspects, and it is important to distinguish between them, namely, (a) discontinuity as constituting (or as evidence of) tacit abandonment of title by desuetude, or as leading to loss of title by *derelictio*; and (b) discontinuity as operating to prevent the acquisition of any completed title in the first place, or as evidence that no valid title was ever acquired. In short — if a little paradoxically — continuity may be an element not merely in the retention, but in the establishment, of title.

Fitzmaurice, The Law and Procedure of the International Court of Justice, 32 B.Y.L.C. 20, 66 (1955-56).

It is in Fitzmaurice's sense of lack of continuity in the *establishment* of (historic) title, rather than in the *retention* of (ancient) title, that the Special Master's finding, Report at 65-66, must be understood, unless one assumes, as the United States does, that the Special Master had at that point forgotten the distinction he had previously made painstakingly. *See* Report at 25, 27.

We have not excepted to the Master's findings as to lack of continuity of a *claim* leading to a historic title.[20] The issue of lapse of an already perfected title was never argued, or briefed to, the Special Master, and it therefore hardly surprises that he made no findings in that regard, all the more so since that is a question which, under substantive international law, has its own well established criteria. The United States, the party now advancing this argument at a late point has, significantly, stated the matter in purely conclusory terms by refraining from any discussion as to the substantive law involved. Those substantive elements will now be outlined by us below, briefly, in order to indicate how well justified the Special Master was in *not* making a finding in favor of the United States on this issue. A sovereign title can indeed be lost by abandonment or *derelictio*, but the conditions for such an occurrence have not been met in the case of Nantucket Sound.

Before we proceed, a note on terminology is in order: the United States has spoken of "renunciation", "repudiation", or "relinquishment" on one hand and "abandonment" on the other. Reply Brief at 11-17. Actually, the distinguishing feature between "renunciation" and "abandonment" is that, in the former, the territory involved comes immediately under the jurisdiction

[20] Of course this does not mean that we *agree* with the United States that there was a total "absence" of evidence in Massachusetts' favor as to a historic title. *See* Reply Brief at 5-6.

of another sovereign, whereas, in the case of "abandonment," the territory becomes *res nullius*. Brownlie at 139. Since no one argues that after the Revolution any sovereign displaced Massachusetts and the United States in Nantucket Sound,[21] the term "renunciation" can usefully be omitted from the remainder of the discussion. Other terms used by the United States have no relevant technical meaning in this context, and we understand them as equivalents of "abandonment."

The first aspect of the "abandonment" theory is that it is, indeed, almost entirely a theory. While it is theoretically possible in international law for a sovereign title to territory to be "abandoned," actual instances thereof are exceedingly rare. Hyde at 392. Not the least reason therefor is that the application of the theory is in derogation of stability of titles among nations. The claim that a sovereign nation has abandoned territory can cause international tensions, and, in general, is not favored in application, and ought not to be presumed.[22] *See, e.g.*, Brownlie at 148, 1 Hackworth, Digest of International Law 442.

There are two possible modes of abandonment. First, there is abandonment by mere inaction, or by a failure to maintain or assert some aspect of occupation or sovereignty. Second, there is abandonment by explicit action.[23] The distinction, and the general rule, has been summarized thus:

[21] While it can be argued that the world community acquired certain limited rights in the high seas after the doctrine of freedom of the seas matured, this is certainly not sufficient to constitute it a "sovereign" as is traditionally implied by the use of the term "renunciation." Equally, after that point in time, seabed title could not "revert" to *res nullius* status. Abandonment, strictly speaking, is limited to such situations. Brownlie at 139, Hyde at 392. However, there is no harm in using "abandonment" in the sense the United States does as long as these distinctions have been noted.

[22] On this point, at least, the United States tends to agree: "Perhaps one ought not to *presume* such a retrenchment." Reply Brief at 11 (emphasis in original).

[23] It is in this latter sense of "active" abandonment that the United States seems to have employed the terms of "renunciation," "repudiation," "relinquishment," and "disclaimer" in its Reply Brief.

> However, once a clear title based on occupation is held to have been finally and definitively established, it would seem also to result from the *Clipperton Island* case that *abandonment*, as such, would normally have to be express or manifest, and could only be presumed from mere inactivity if there was a competing claim, or if inactivity was so long continued as to constitute abandonment or to lead to an irresistible inference of intention to abandon, even if only tacit.

Fitzmaurice, 32 B.Y.L.C. at 67 (emphasis in original).

A. *"Passive" Abandonment.*

It cannot be overemphasized that the quantum of occupation or state assertion of jurisdiction required to *retain* a title is a minute fraction of that required to *establish* a title. Thus, very little indeed is required to prevent loss of a perfected title by *derelictio*. *See, e.g.*, Brownlie, *supra*.

The second initial point that must be made is that with respect to abandonment by mere inactivity, under settled international law there can be considerable gaps in time with respect to the continuity of *retention* of title without causing actual abandonment. *See, e.g.*, Fitzmaurice at 68. Subject only to one crucial element (which is found in the case at bar) international tribunals have treated as not significant virtually *total* gaps in occupation or jurisdiction for very extensive periods of time. In each of two leading cases, "gaps" in excess of *two centuries* did not constitute abandonment. *Case of the Minquiers and the Ecréhos*, [1953] I.C.J. Reports 47; *Eastern Greenland Case*, P.C.I.J. Ser. A/B, no. 53, 52 (1933). *See* Fitzmaurice at 68-69, 70 n.2. In the *Eastern Greenland Case*, the Court

even characterized the Royal claims during the two-century gap as mere "pretensions." That contrasts sharply with the facts in the case at bar.

The determinative element (alluded to above) which will permit time gaps of over two centuries without divesting a perfected title is the absence of a competing claim during the time gap. Thus, the *absence* of a competing claim, which is *one* of the elements in evaluating the ripening of a historic claim, *see, e.g., United States* v. *Louisiana (Mississippi Sound Case)*, 105 S.Ct. 1074 (1985), is dispositive where it is alleged that cessation of any factors of occupation, even for a long time, amounts to abandonment.

The following observations are in order as to the present fact situations: first, there has been no suggestion, or any iota of evidence, that after Independence *any* foreign power *ever* asserted a claim to Nantucket Sound, or even, that there was an assertion (by word or deed) by any nation or international body, on behalf of the world community, that the Sound was ever *res communis*. Thus, there is no difficulty in applying the rationale of the *Greenland* and *Minquiers* cases, *supra*, which would permit a lapse of *two centuries* from the date of Independence of the United States without causing abandonment. Second, there was no total cessation in law during the time period in question for Nantucket Sound as there was in the two cases cited, so that, in the case of Nantucket, the argument for *retention* of title is very much stronger. We now proceed to outline the distinguishing features characterizing the post-colonial history of the Sound.

We have already discussed above in some detail in response to the United States' two "threshold questions" why the Special Master was correct in finding that there had been effective occupation of Nantucket Sound in colonial times. In summary, what the Master found to be the unique historical geography of the Sound, including the intensive and exclusive exploration

of its resources by the colonists, was contemporaneous with the other attributes of sovereignty and occupation, namely discovery, and the political and legal assertions of ownership over the territory (the colonial charters and the county waters *inter fauces terrae* doctrine).

With that in mind, it is hard to see how occupation or sovereignty of the Sound can be said to have ended after Independence, and a passive abandonment taken place: (a) discovery of the Sound in issue is a historical fact and has not changed since Independence; (b) the territory in question belonged to the Crown, and, even if it did not pass by charter (as the Special Master found) it passed to Massachusetts by virtue of the Definitive Treaty of Paris in 1783, *see Mahler* v. *Norwich and N.Y. Transportation Co.*, 35 N.Y. 352 (1866); (c) the *inter fauces terrae* line of sight test as defined by Lord Hale was the manifested position of the United States in foreign affairs in the Nineteenth Century; and finally, (d) the unique political economy and historical geography of the Sound did not change after Independence. The intensive, exclusive exploitation of the entire Sound by the inhabitants of the contiguous enclosing *terra firma* has continued into the Twentieth Century. No showing has been attempted, let alone made, that it ceased in the Eighteenth Century or thereafter.[24]

It has been adjudicated (as noted above) that significantly less activity and political assertions than are present in the case of Nantucket Sound, for a period of two centuries, will not cause abandonment. To this must be added the effect of a doctrine which, in the context of Nantucket Sound, makes a finding of abandonment even less supportable. This doctrine

[24] The *only* economic activity that attenuated within the Sound was whaling after 1750, as the Special Master noted. Report at 54. But this was only *one* of the economic activities discussed, and sedentary and other fisheries continued unabated. No *animus* of abandonment can therefore be implied from the demise of whaling, which resulted from the exhaustion of the resource involved.

deals with the practical issue of whether territory, even if *deserted*, remains subject to the power of the sovereign to assert "unmolested supremacy" in the area, if it so wished. This depends both on geographical considerations and on the military power of the sovereign. The principle has been delineated thus by Professor Hyde:[25]

> When a State appears voluntarily to have deserted territory the control of which constantly remains within its grasp, abandonment should not be deemed to have taken place without ample proof of a design to give up all rights of property and control.
>
> Abandonment as a process of law is not, however, believed to be wholly dependent upon the design of the State acknowledged to have been the territorial sovereign of a particular area. Its action or inaction may have been such as to convince the impartial mind that that sovereign is not in a position to deny that it has given up its rights. Nevertheless, the conditions that would compel such a conclusion must depend upon the circumstances of the particular case, and must be expected to be influenced by the geographical relationship of the territory concerned to that of the alleged abandoner, and also by the existence of its power at all times to assert unmolested supremacy within the area concerned. Where the retention of such power is obvious, long-continued,

[25] Professor Charles Hyde's International Law Chiefly As Interpreted and Applied by the United States, is one of the few sources mentioned by name in Brownlie, see Brownlie at 25, as examples of publications of such authority that they are in themselves a source of international law pursuant to the Statutes of the International Court of Justice.

> and uninterrupted, evidence of affirmative action indicative of a design to surrender might be fairly regarded as essential in order to produce an extinction of the right of sovereignty.

We submit that the "power" of the United States of America to "assert unmolested supremacy" over Nantucket Sound has indeed been "obvious, long continued and uninterrupted." This military and geopolitical obstacle to any theoretical adverse claimant (coupled with the historical nonexistence of any such adverse claimant) would seem to rule out abandonment by mere inactivity in the post-colonial period in Nantucket Sound. What is therefore required is "evidence of *affirmative* action indicative of a design to surrender." We now proceed to demonstrate that the record in this case contains no such *affirmative* evidence.

B. *The United States' Argument of Abandonment by Affirmative Acts Since Independence.*

In one form or another the bulk of the remainder of the United States' Reply Brief is devoted to the proposition that by some means or other, Nantucket Sound was relinquished, renounced, repudiated, or disclaimed subsequent to Independence.

Again, it is important to note what the Special Master found, rather than what the United States infers. The Special Master did *not* find that an ancient title, if perfected, had been "abandoned," "relinquished," "repudiated," "renounced" or "disclaimed." The Special Master discussed whether a prescriptive title had been perfected, and not whether an ancient title had been *retained*, during that period. As to any "disclaimer," in the sense the term has been used by the Court in previous cases, the Master explicitly found against the United States on

several grounds. Report at 13-20, 69.3-69.4. *See also* Brief in Support of Massachusetts Exception at 20-23. The United States now raises a large array of objections to this finding.

1. Alleged Abandonment by the United States.

The United States alleges that, by a variety of actions, it has repudiated or disclaimed Massachusetts' ancient title.

We must first distinguish between judicial and foreign affairs manifestations of the alleged United States position after Independence. As to the former, it seems undisputed at this point that the rule in England was that of Hale. Accordingly, since the common law of England was the common law of the United States and its several states until changed by statute or judicial decision, we must inquire what the first American judicial treatment was. The first American case to deal with the Coke versus Hale question was a United States court, sitting in Boston, in 1829. *United States* v. *Grush, supra,* discussed in Report at 44-45. The United States has conceded that the English rule favored Hale. Judge Story, in *Grush*, favored Coke. The United States represents that the parties agree on the basis of this decision that the Coke test was the American position "from the first." Reply Brief at 13 n.11. That representation is incorrect. Furthermore, this Court has indicated that assertions of criminal jurisdiction do not constitute a historic title claim. *See United States* v. *California*, 381 U.S. 139, 174-175 (1965). That being so, it is difficult to see why they should constitute a "disclaimer" or renunciation of historic title, and still less of a perfected ancient title. To put the matter differently, the judicial decisions on which the United States relies dealt only with aspects of federal-state or intrastate curial jurisdiction. Even if, *arguendo*, other nations were aware of them[26] (which the United States has

[26] *Manchester* v. *Massachusetts* is a special instance, which will be discussed separately below. Suffice it to say here that we have never relied on the *Man-*

not attempted to show), these decisions did not purport to, nor could they, disclaim or renounce a title to seabed already perfected under international law.

The next instance of a federal "disclaimer" suggested by the United States are the early United States customs statutes discussed by the Special Master in the Report at 62-64. The Special Master may have been correct in deeming it significant that these acts did not explicitly designate Nantucket Sound as one or more customs districts, but he did so in the context of an inquiry into a historic title claim, not ancient title abandonment. It can hardly be argued that Congress intended to *abandon* any territory merely by failing to designate the area as a customs district. That such omission cannot be construed in such an affirmative sense seems clear from the case of Long Island Sound. That Sound is acknowledged by the United States and by its Coastline Committee to be a historic bay. The roots of the claim are followed back to colonial times. *See Mahler*, 35 N.Y. at 912-913, discussed in the Report at 37-42. Yet Long Island Sound was not designated a customs district,[27] and under the extreme position of the United States in this litigation, that fact would have "repudiated" any establishment of title in the colonial era, and further, would have, in ongoing fashion, acted as an absolute barrier to the ripening of any historic title claim in the Federal period.

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chester decision *per se*, but on the fact that the text of the decision quoted the relevant state statutes and stated the location of the relevant large scale charts. *Manchester* was not the claim, but pointed the reader to the actual claim.

[27] This follows from a reading of the statute dealing with *both* the Connecticut shore and the Long Island North Shore. As to the latter, the statute refers to "waters", but with respect to Connecticut, it does not. Accordingly, the reference to "waters" for the Long Island side must be construed as referring to the smaller bays indenting Long Island, rather than the Sound proper. An opposite construction would lead to the absurd result that the New York district went all the way across the Sound up to the Connecticut tidemark.

The next argument by the United States, that it is the Sound's status as a geographical strait that automatically subjects it to an alleged blanket disclaimer by the United States, arises out of a single statement by the Secretary of State in 1886. *See* Reply Brief at 18-19. Here again, the United States, contrary to the Special Master's explicit order, first raised this issue in its Post-Trial Reply Brief. As a result, the Special Master allowed Massachusetts a four-page post-argument memorandum in rebuttal. Moreover, the United States did not at trial develop the facts needed to support its legal theory.

First, is the issue of "cul-de-sacs": literally, that means a dead end, and a geographic strait can never be a true dead end, by definition. Accordingly, the commonsense use of the term in this context, if it is to mean anything at all, is to differentiate between a strait which is useful for communication between different parts of the high seas (such as the straits of Gibralter, the straits of Hormuz, and the Dardanelles) and a strait whose primary function is to serve as a conduit for navigation to and from inland ports and waters on one hand, and the high seas on the other.

Nantucket Sound fits into the latter category. Historically, to the extent it was utilized by foreign flag vessels at all, it was used for access or egress from a United States port in North-South coastal traffic and thus for the benefit of national maritime commerce of the United States. Tr. 1019. Until modern times, a captain who was not going to or from a northeastern coastal port would have avoided the Sound (given its shifting and treacherous shoals and the need for a pilot) and would have given Cape Cod and its dangerous shoals a wide berth. In modern times, even coastal traffic largely ceased, since as one witness, a former naval officer, testified, a captain "would be virtually out of his senses" to go through the Sound rather than the Cape Cod Canal. Tr. 1017. *See* Report at 67.

The United States had an opportunity to attempt to develop the historical and geographic-hydrological facts needed to support their interpretation. They failed to do so, and should not be allowed to develop their case by assumption, or invite the Court to do so at this late date.

As for the United States' reliance upon the Corfu Channel decision, we submit that the Master correctly understood that decision as the passage quoted by the United States, Reply Brief at 18 n.14 demonstrates in its identification of one "decisive criterion" as "the fact of its [the strait's] being used for international navigation." The Special Master did not emphasize the "volume" of international traffic as the United States suggests. If the strait is not in fact used for international traffic, it cannot have any "importance" for that purpose.

In that connection, even as to the period before the opening of the Cape Cod Canal in 1914 (see Report at 67), the United States was obligated to adduce *concrete* evidence as to the amount of *foreign* shipping traffic (and, we submit, its route and destination). *United States* v. *California*, 381 U.S. 139, 171-172 (1964).[28] It did not do so.

As Professor Hyde has succinctly pointed out, "If there have been 'historic bays' there have also been 'historic straits . . .'." That crucial point is ignored by the United States in its argument. We submit that the United States has not demonstrated (as it must if it wishes to prevail on this issue) that its consistent and unequivocal foreign affairs position, effectively communicated to other nations, that it disclaims all geographical straits that do *not* meet its present "cul-de-sac" formulation and which

[28] Since the Court's discussion dealt with a "fictitious bay" — not a historic bay — argument, even factual proof in the present case of international shipping would not be determinative, nor would it have overcome the effect of the United States' 1930 reservation, which is discussed below.

have been used by international shipping to some degree, no matter how slight. The record demonstrates the opposite.[29]

The United States argues that the Master's findings as to the effect of the COLREG lines on the alleged disclaimer are incorrect because the Coast Guard lines were allegedly published on the same large scale charts which showed the territorial sea lines. Reply Brief at 20 n.16. This is an argument that the United States did not see fit to make to the Special Master. In any event, the United States did not introduce evidence demonstrating that throughout the time period discussed by the Special Master (Report at 16-18) *all* editions of the government charts covering this area in print from time to time, displayed both types of lines.[30] In the same footnote, the United States argues that the Master's findings were incorrect because once the Coast Guard lines were changed in 1979, they no longer showed Nantucket Sound as inland. However, this ignores the Master's detailed findings that the change was brought about by the Justice Department to bring the Coast Guard lines "into accord with the litigation posture of the United States" in the present proceedings. Report at 18.

Second, there is the matter of the alleged position of Mr. Pearcy, the late Geographer of the State Department, in a 1959 article. *See* Reply Brief at 20, *discussing*, Pearcy, Measurement of the U.S. Territorial Sea, 40 Dept. St. Bull. 963 (1959). According to the United States, "the status of the Sound was made explicit" through that article, and constituted "an unambiguous disclaimer of the Sound long before the recently published charts." The article is neither unambiguous, nor, for that matter, a disclaimer.

[29] *See, inter alia*, the discussion of the United States' 1930 Geneva reservation in this regard, *infra* at 40.

[30] For example, the mere showing of one chart containing both lines would not substantiate the government's argument, unless it was also shown that this chart was the current edition throughout the period July 15, 1977 and April 16, 1979.

The United States has been very reticient in this litigation with respect to this newest of arguments. First, this alleged disclaimer was not specifically identified by the United States in discovery in response to a direct, specific request by Massachusetts. The article was not one of the large number of exhibits introduced by the United States at trial.[31] Contrary to the Special Master's directions in this regard, not a word was heard about this argument until the United States' post-trial reply brief, where a brief quotation was merely mentioned in passing. The Special Master, accordingly, very appropriately considered it not to merit discussion.

There are, of course, important preliminary questions concerning this article, which the United States has carefully shielded from resolution during trial. In what capacity did Mr. Pearcy write this article? Did the positions therein represent his own professional viewpoint or that of the Department? Was he authorized to *disclaim* marine territory of the United States? Was his position reviewed by the Secretary or his designee? Would foreign nations have been justified in interpreting this as a *disclaimer* by the United States?

The answer to some of these questions can be found in the article itself. It must be doubted that Mr. Pearcy was articulating the official foreign affairs position of the United States, in view of his discussion of the applicability of the "straight base line method" under the Convention. Pearcy at 971. He identifies the southeast coast of Alaska as "requiring the use of a straight baseline." And he describes the coast of Maine, the Florida Keys, and the Mississippi Delta as "sufficiently complex to give pause to [*sic*] a consideration of the use of this method." As we understand the official foreign affairs position of the United States, as alleged in this and other seabed

[31] The United States in fact relied only upon a quotation from Pearcy in a secondary source. Our own analysis considers the entire Pearcy article.

litigation, the United States has unequivocally declined to adopt this optional method of baseline delimitation though it is permitted by the Convention. *See* Report at 6.

Finally, the passage quoted from this article, Reply Brief at 20, is most ambiguous in this context. Mr. Pearcy's description is not "wholly inapposite if the Sound was inland water." He merely states that Martha's Vineyard's territorial sea "coalesces" with that of the mainland and Nantucket, but that would be the case if both Vineyard and Nantucket Sounds were enclosed. A glance at the map addendum to Massachusetts' Brief makes this evident. Nantucket's territorial sea would coalesce with that of Cape Cod by means of the territorial sea long the Monomoy-Nantucket closing line, and the Vineyard's territorial sea would coalesce with the mainland likewise, and also, by another route, along the closing line from Gay Head to Cuttyhunk Island and from there to the mainland. Mr. Pearcy uses the word "coalesce" in the broadest sense (not merely as denoting "overlapping"), since, for example, he states that the territorial seas of the Vineyard and Nantucket Islands "coalesce." To the extent it can be said they do, it is only by utilizing "islands" or "construction points" between these two large islands: each of the former, under the Convention, have their own three mile territorial seas. *See e.g.*, United States Exhibit 9.

It is not productive to argue exactly *what* Mr. Pearcy meant — if there was room for argument, as we submit, then there cannot have been a purported disclaimer, which of necessity must be ambiguous.

2. Allegations that Massachusetts Itself Disclaimed Title to Nantucket Sound.

There is no need to discuss separately the supposed impact of Massachusetts state court decisions favoring the Coke over

the Hale test. Our rebuttal to the United States' argument concerning like federal decisions applies equally here.

The United States next refers to Massachusetts legislation in 1859 as disclaiming Nantucket Sound, since it establishes a two league (six nautical mile) standard for enclosing arms of the sea. However, as was argued in detail to the Special Master, this act was passed in response to a state court decision to the effect that on the open sea (as in England), the county's jurisdiction ended at the water's edge. Post Trial Reply Memorandum for the Commonwealth 56-62. Concerned with this serious gap in criminal jurisdiction, the legislature's primary purpose was to extend the criminal jurisdiction of the county courts to the seaward limit of state jurisdiction. No intent on the part of the legislature to *abandon* vested title to inland waters can be inferred.[32]

More important, however, in the present context, is the issue of whether Massachusetts had the constitutional authority to repudiate inland waters in the national domain, and whether foreign governments, without inquiry of the national sovereign, could have relied thereon. In any event, there is no showing whatsoever by the United States that *any* foreign nation would have become aware of the 1859 Massachusetts statute prior to the Twentieth Century, as a result of the *Manchester* decision. *See* Report at 60. If, after World War I, a foreign nation became aware, because of that decision, of the text of the 1859 law, it would also have been charged with knowledge of

[32] For example, as we previously pointed out, this Court in *Manchester* v. *Massachusetts* affirmed that Massachusetts had obtained Buzzards Bay through its colonial charter. 139 U.S. at 256. Buzzard's Bay barely meets the six mile test of the 1859 statute, and, had it not, one could hardly infer the intent of the Massachusetts legislature to "abandon" this title. Further, the 1932 fisheries legislation, which the Special Master found applied to the entire Sound (Report at 69.2) also shows that the Massachusetts legislature did not deem its jurisdiction over the center of the Sound to have been "abandoned."

the large scale Massachusetts charts showing its closing lines. *See* Report at 60. The relevant chart (Mass. Ex. 4) reveals a striking ambivalence: While Vineyard Sound is closed off at its Eastern end (less than six miles) it is *open* at the Nantucket Sound end. But high seas status for Nantucket Sound (as argued by the United States) would have necessitated a closing line at the Vineyard Sound juncture.

The ambivalence is shown by another official Massachusetts map discussed by the Special Master (Report at 65), which is Exhibit E to his Report. That map, published *after* the 1859 statute was enacted, nevertheless shows "median line treatment" for county waters within Nantucket Sound (even though, as the Master correctly noted, it did not designate the Sound as county waters). It seems clear county jurisdiction median line treatment in the Sound (between Nantucket and the mainland) would be inapplicable if that Sound were high seas.[33]

Thus, while the Special Master may well have been correct in finding that these Massachusetts charts and maps do not justify a contemporaneous historic waters claim, the United States is incorrect in assuming that these charts are sufficiently unambiguous as to Nantucket Sound to evidence an abandonment of a vested title.[34]

The United States asserts that Massachusetts "continually reaffirmed" the "explicit disclaimer" of the 1859 Act for "well over a century." Reply Brief at 15. We have shown above that the 1859 Act and the 1881 charts did not and could not "renounce" or "disclaim" Nantucket Sound. Apart from the Act and the charts, the only evidence cited by the United States to support its extravagant assertion concerns reports prepared by various state officials in 1968 and 1969 to support legislative

[33] An Examination of Appendix E will show that the "median line" extends into the center of the Sound much further than the three mile limit.

[34] Again, assuming that Massachusetts *could* have abandoned such a title had it wanted to.

proposals. *See* Reply Brief at 15-16 n.13. According to the United States, these exhibits show acceptance of the United States' alleged position that Nantucket Sound was not inland waters.[35]

We begin our response, once again, with an objection. What the United States argues is a capsule version of its own much more detailed contentions before the Special Master, to which Massachusetts responded at length, and which the Special Master evidently deemed so lacking in merit as not even to require discussion.[36] At this stage in the proceedings, it is incumbent upon the United States, if it insists upon an evidentiary argument which has been considered and rejected by the Special Master, to do more than simply reiterate its own side of the argument, especially in so condensed and conclusory a form.

For example, the United States notes that the Governor's Conference on Massachusetts' Stake in the Ocean, and the then Attorney General of Massachusetts, both recommended legislation extending Massachusetts' boundaries to the limits permitted by the Convention. Both acknowledged that the geographical tests employed by the Convention would not enclose Nantucket Sound, and the United States infers that Massachusetts therefore acknowledged that the Sound is not inland waters. What the United States omits to mention, how-

[35] Although we believe that the United States misconstrues these reports and, further, that it attributes to them a weight and prominence which, in context, they do not have, even if the United States had correctly described them it is inconceivable that these isolated statements to the Massachusetts legislature could have international significance. Still less could they operate as an effective renunciation: there is not the slightest evidence that these reports circulated beyond the walls of the Massachusetts State House.

[36] The United States' argument in the Reply Brief at 15 n.13 is a highly condensed version of the argument made in its initial post-trial brief to the Special Master at 58-66. Massachusetts responded to the argument in its post-trial reply memorandum to the Special Master at 67-76.

ever, is the fact that neither the Conference nor the Attorney General purported to determine whether the Sound is historic inland waters.

Furthermore, the United States also omits to mention the almost contemporaneous conclusion of a special legislative commission, in 1971, that Nantucket Sound qualifies as historic waters under the Convention.[37] By statute in 1971, the Commonwealth explicitly enclosed Nantucket Sound within its marine boundaries. St. 1971, c. 1035.

More could be said in response to this argument, but what has been said suffices to show that the Special Master assessed the argument realistically when he passed it over in silence.

3. The Record Contains Evidence Contradicting the United States' Argument.

The United States, far from following Lord Coke's test "from the first," manifested its support for Lord Hale's test. The first indication was the letter by Attorney General Randolph in 1793 (discussed in the Report at 34-37). That opinion dealt with the legal status of Delaware Bay, and analogized to the situation in Chesapeake Bay, as follows: "Nay, unless these positions can be maintained, the bay of Chesapeake, which, in the same law, is so fully assumed to be within the United States, and which, *for the length of the Virginia territory, is subject to the process of several counties to any extent,* will become a rendezvous to all the world, without any possible control from the United States." Quoted in Moore, Digest, § 153 at 7348 (emphasis added).

It should be recalled that under the common law, the jurisdiction of the county stopped at the sea shore, unless the waters were county waters by virtue of being *inter fauces terrae*. *See, e.g.*, Fulton at 547, *quoted in* Report at 31. Chesapeake Bay

[37] Fifth Report of the Special Legislative Commission on Marine Boundaries and Resources, 4 Sen. Rep. 1580 (Sept. 20, 1971), U.S. Exhibit 52.

is 9.5 nautical miles wide at its entrance (between Cape Henry and and the Issacs). Hyde, § 146 at 470. There is no way that the application of the Coke test could have enclosed that Bay (*see, e.g.*, Report at 498 as to the limits of that test) and, therefore, the applicable test must have been that of Hale. Had Chesapeake Bay not been enclosed by means of this test, there could, under prevailing law, have been no county waters therein, nor any talk by the Attorney General of the "process" of counties therein.

Attorney General Randolph's opinion resulted in a communication from Secretary of State Thomas Jefferson to the foreign powers involved. Report at 35. The United States has admitted that the contents of the opinion were "notified to the world community." Reply Brief at 18. England, as has been previously shown, adhered to the Hale test, and, accordingly, would have had no grounds for taking issue with the preference for Hale indicated by the Randolph opinion.

The United States' preference for the Hale test was subsequently, and even more explicitly, manifested in a letter from Thomas Jefferson, by then President of the United States. In his September 8, 1804 letter to the Secretary of the Treasury, Jefferson dealt with the subject of British vessels off New York and the proper method of delimiting inland waters and the territorial sea of the United States beyond:

> [I]t will be necessary for us to say to them with certainty which specific aggressions were committed within the common law, which within the admiralty jurisdiction, & which on the high seas. The rule of the common law is that whenever you can see from land to land, all the water within the line of sight is in the body of the adjacent county & within common law jurisdiction. Thus, if in this curvature *acb* you can see from *a* to *b*, all the water within the line of

> sight is within common law jurisdiction, & a murder committed at *c* is to be tried as at common law. Our coast is generally visible, I believe, by the time you get within about 25 miles. I suppose that at N York you must be some miles out of the Hook before the opposite shores recede 25. miles from each other. The 3 miles of maritime jurisdiction is always to be counted from this line of sight.

Mass. Exhibit 110.

The United States, in its post-trial reply brief to the Special Master at 18 responded to this point with a quotation from Jessup to the effect that "it is believed that" this letter by Jefferson was not communicated to any foreign powers and therefore did not represent a diplomatic position. Jessup cites no support for this "belief," and it seems tendentious in the context of the position Jessup is developing. The content of, and circumstances surrounding, the Jefferson letter clearly imply the contrary. Since depredations of British ships were concerned, it would be surprising if the President's position had *not* been communicated to that power, if only orally. Also, Jessup failed to take into account the content of the Randolph opinion, discussed above, and Jefferson's connection therewith, as then Secretary of State.

Considering, therefore, the fact that straits *were* capable of expropriation, *see* Report at 35-36, 62-63,[38] and that the test for delimitation favored in the federal period was the broader "Hale" test, there is no indication of an American intent to abandon any vested title to Nantucket Sound.

Moreover, there is further evidence negating an affirmative abandonment by the United States, of a more general nature.

[38] "However a close reading of the Opinion shows that Randolph considered sounds and straits to be as susceptible of an assertion of United States jurisdiction as bays."

In 1930, the United States introduced a reservation at the 1930 Geneva Codification proceedings (see Mass. Exhibits 121 and 122): "(C) Waters, whether called bays, sounds, straits or by some other name, which have been under the jurisdiction of the coastal state as part of its interior waters, are deemed to continue a part thereof."[39]

The clear position of the United States expressed in its reservation (which could not have received wider circulation internationally) is that irrespective of any emerging or enacted rules of international law, it was retaining and reaffirming title that it already possessed.[40] Indeed, this 1930 reservation has been aptly described by a leading commentator as manifesting the doctrine of *uti possidetis*.[41] Hyde at 478. It is also significant that the doctrine is primarily utilized (in South America, Asia, and Africa) to preserve colonial (pre-independence) lines and boundaries. Brownlie at 137-138.

Thus, on the basis of the foregoing, the assertions by the United States that it has consistently, in foreign affairs, "disclaimed title to the Sound as inland" and that this is "a consistent stance dating back almost two centuries," Reply Brief at 17, are simply contrary to fact.

In conclusion, all the factors claimed by the United States to constitute, in effect, active abandonment of title to Nantucket Sound may operate to prevent the *ripening* of a prescriptive

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[39] Since the codification, ultimately, was not adopted internationally, a provision for the publication and circulation of large scale charts was never implemented.

[40] We think it noteworthy that we have in these proceedings several times orally and in writing quoted this reservation and invited the United States to reconcile it with their allegation of the "consistent" U.S. position. The United States has *never* referred to this instrument, however.

[41] From the decree of the Praetor in Roman Law: "*Uti possidetis, ita possideatis* ("As you possess, so may you possess"). Hyde at 501 n.8.

claim; they can not, under the standards of international law, affect the *retention* of an ancient title, already perfected.

Conclusion.

We have not responded to the United States' argument dealing with the burden of proof issue since the nature of this brief would seem to preclude that. However, we respectfully submit that the determinative issue remains whether the Court should apply the "clear beyond doubt" standard or whether the Special Master's alternate finding on Nantucket Sound should be adopted. For the reasons we have previously stated in our first brief, we respectfully pray for judgment in Massachusetts' favor on that issue.

Respectfully submitted,

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No. 35, Original

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF MAINE, ET AL.
(MASSACHUSETTS BOUNDARY CASE)

ON EXCEPTION TO THE REPORT OF THE SPECIAL MASTER

JOINT MOTION FOR ENTRY OF A SUPPLEMENTAL DECREE, MEMORANDUM IN SUPPORT OF THE JOINT MOTION, AND PROPOSED SUPPLEMENTAL DECREE

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 35, ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF MAINE, ET AL.

(MASSACHUSETTS BOUNDARY CASE)

ON EXCEPTION TO THE REPORT OF THE SPECIAL MASTER

JOINT MOTION FOR ENTRY OF A SUPPLEMENTAL DECREE

The United States of America and the Commonwealth of Massachusetts jointly move that this Court enter a supplemental decree in the form and manner of the attached proposed decree. The basis for this motion is explained in the memorandum that follows.

Respectfully submitted.

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Attorney General

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DREW S. DAYS, III
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JANUARY 1996

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 35, ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF MAINE, ET AL.

(MASSACHUSETTS BOUNDARY CASE)

ON EXCEPTION TO THE REPORT OF THE SPECIAL MASTER

MEMORANDUM IN SUPPORT OF THE JOINT MOTION FOR A SUPPLEMENTAL DECREE

This joint motion arises from litigation between the United States and the Commonwealth of Massachusetts over whether Vineyard Sound and Nantucket Sound are part of the "internal waters" of Massachusetts. This Court has decided that Vineyard Sound qualifies as internal waters, but Nantucket Sound does not. *United States* v. *Maine*, 475 U.S. 89 (1986). The United States and Massachusetts have prepared the proposed decree in conformity with the Court's decision.

1. In 1969, the United States brought suit against 13 States to resolve disputes respecting the scope of the federal sovereign interest in the seabed and

submerged lands underlying the Atlantic Ocean. See *United States* v. *Maine*, 395 U.S. 955 (granting the United States leave to file complaint). The Court appointed a Special Master, 398 U.S. 947 (1970), who submitted a report to the Court, 419 U.S. 814 (1974). The States filed exceptions to the Special Master's report. The Court overruled those exceptions, concluding that the United States has sovereign rights over the seabed and subsoil lying more than three geographic miles seaward from the ordinary low-water mark and from the outer limits of inland coastal waters. 420 U.S. 515 (1975). The Court entered a decree in accordance with that ruling. 423 U.S. 1 (1975).

2. The Court retained jurisdiction to resolve remaining issues respecting the location of the coastline of the States and the seaward boundary between the seabed lands of the States and those of the United States. *United States* v. *Maine*, 421 U.S. 958 (1975). In 1976, the United States filed a motion for supplementary proceedings to resolve issues respecting portions of the coastlines of Rhode Island and Massachusetts. The Court appointed a new Special Master, 433 U.S. 917 (1977), who severed the Massachusetts dispute from the Rhode Island dispute and allowed New York to intervene in the latter proceeding. See *United States* v. *Maine (Rhode Island and New York Boundary Case)*, 469 U.S. 504, 508 (1985).

In the case of the dispute involving Rhode Island and New York, the Special Master submitted a report addressing the status of Block Island Sound and a portion of Long Island Sound. *United States* v. *Maine*, 465 U.S. 1018 (1984). The United States, Rhode Island, and New York all filed exceptions to the

Special Master's report. The Court overruled those objections, concluding that certain portions of the waters in dispute are "juridical bays" and therefore inland waters of the States. *United States* v. *Maine (Rhode Island and New York Boundary Case)*, 469 U.S. 504 (1985). The Court entered a supplemental decree in accordance with its ruling. 471 U.S. 375 (1985).

In the case of the Massachusetts dispute, the Special Master submitted a report addressing the location of portions of that Commonwealth's coastline in the area between Eastern Point, on Cape Ann, and Race Point, on Cape Cod, and between Gooseberry Neck and Cuttyhunk Island. The parties filed no exceptions to that report, and the Court accordingly entered a supplemental decree adopting the Special Master's determinations. *United States* v. *Maine (Massachusetts Boundary Case)*, 452 U.S. 429 (1981). The Master separately addressed the question whether Vineyard Sound and Nantucket Sound are inland waters of the Commonwealth. The Master submitted a report recommending that Vineyard Sound constitutes inland waters, but Nantucket Sound does not. *United States* v. *Maine*, 472 U.S. 1015 (1985). Massachusetts filed an exception respecting Nantucket Sound, but the Court overruled that exception. 475 U.S. 89 (1986).

3. In its decision respecting Nantucket Sound, the Court directed the parties "to prepare and submit a decree conforming to the recommendations of the Special Master." *United States* v. *Maine*, 475 U.S. at 105. The parties began work in preparing the decree, but as a result of changes in the respective governments' personnel and the press of other government business, the undertaking did not progress for a

considerable period of time. The United States and the Commonwealth of Massachusetts have now resumed and completed that undertaking. The proposed decree describes the location of the Massachusetts coastline in the vicinity of Vineyard and Nantucket Sounds in accordance with this Court's February 25, 1986, decision, the Special Master's report, and agreements reached between the parties.

Respectfully submitted.

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Attorney General

DREW S. DAYS, III
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Assistant Attorney General
Commonwealth of
Massachusetts

JANUARY 1996

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 35, ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF MAINE, ET AL.
(MASSACHUSETTS BOUNDARY CASE)

ON EXCEPTION TO THE REPORT OF THE SPECIAL MASTER

PROPOSED SUPPLEMENTAL DECREE

The Court having, by its decision of February 25, 1986, adopted the recommendation of its Special Master that Vineyard Sound constitutes historic inland waters and overruled the exception of Massachusetts to the Report of its Special Master herein insofar as it challenged the Master's determination that the whole of Nantucket Sound does not constitute historic or ancient inland waters, and having, to this extent, adopted the Master's recommendations and confirmed his Report:

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. For the purposes of the Court's Decree herein dated October 6, 1975, 423 U.S. 1 (affirming the title of

the United States to the seabed more than three geographic miles seaward of the coastline, and of the States to the seabed within the three geographic mile zone), the coastline of the Commonwealth of Massachusetts shall be determined on the basis that the whole of Vineyard Sound constitutes state inland waters and Nantucket Sound (with the exception of interior indentations which are described in paragraphs 2(c), (d) and (e) below) is made up of territorial seas and high seas.

2. For purposes of said Decree of October 6, 1975, the coastline of Massachusetts includes the following straight lines:

(a) A line from a point on Gay Head on Martha's Vineyard (approximately 41°21'10"N, 70°50'07"W) to the southwestern point of Cuttyhunk Island (approximately 41°24'39"N, 70°56'34"W);

(b) A line from a point on East Chop (approximately 41°28'15"N, 70°34'05"W) to a point on Cape Cod (approximately 41°33'10"N, 70°29'30"W);

(c) A line from a point southeast of East Chop (approximately 41°27'30"N, 70° 33'18"W) to a point west of Cape Pogue (approximately 41°25'06"N, 70°27'56"W) on the island of Martha's Vineyard;

(d) A line from a point on Point Gammon on Cape Cod (approximately 41°36'36"N, 70°15'40"W) to the southwestern-most point of Monomoy Island (approximately 41°33'02"N, 70°00'59"W); and

(e) A line from a point on the west coast of Great Island (approximately 41°37'08"N, 70°16'15"W) to a point on Hyannis Point on Cape Cod (approximately 41°37'27"N, 70°17'34"W).

3. The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as from time to time may be deemed necessary or advisable to effectuate and supplement the decree and the rights of the respective parties.

(6)

SUPREME COURT OF THE UNITED STATES

No. 35, Original

UNITED STATES OF AMERICA, PLAINTIFF *v.*
STATE OF MAINE ET AL.
(Massachusetts Boundary Case)

ON EXCEPTION TO THE REPORT OF THE SPECIAL MASTER

[February 26, 1996]

The joint motion for entry of a supplemental decree is granted.

SUPPLEMENTAL DECREE

The Court having, by its decision of February 25, 1986, adopted the recommendation of its Special Master that Vineyard Sound constitutes historic inland waters and overruled the exception of Massachusetts to the Report of its Special Master herein insofar as it challenged the Master's determination that the whole of Nantucket Sound does not constitute historic or ancient inland waters, and having, to this extent, adopted the Master's recommendations and confirmed his Report:

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. For the purposes of the Court's Decree herein dated October 6, 1975, 423 U.S. 1 (affirming the title of the United States to the seabed more than three geographic miles seaward of the coastline, and of the States to the seabed within the three geographic mile zone), the coastline of the Commonwealth of Massachusetts shall be determined on the basis that the whole of Vineyard Sound constitutes state inland waters and Nantucket Sound (with the exception of interior indentations which

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(b) A line from a point on East Chop (approximately 41°28′15″N, 70°34′05″W) to a point on Cape Cod (approximately 41°33′10″N, 70°29′30″W);

(c) A line from a point southeast of East Chop (approximately 41°27′30″N, 70°33′18″W) to a point west of Cape Pogue (approximately 41°25′06″N, 70°27′56″W) on the island of Martha's Vineyard;

(d) A line from a point on Point Gammon on Cape Cod (approximately 41°36′36″N, 70°15′40″W) to the southwestern-most point of Monomoy Island (approximately 41°33′02″N, 70°00′59″W); and

(e) A line from a point on the west coast of Great Island (approximately 41°37′08″N, 70°16′15″W) to a point on Hyannis Point on Cape Cod (approximately 41°37′27″N, 70°17′34″W).

3. The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as from time to time may be deemed necessary or advisable to effectuate and supplement the decree and the rights of the respective parties.

JUSTICE SOUTER took no part in the consideration or decision of this motion and supplemental decree.